No. 16-1371	
Title:	**Terrence Byrd, Petitioner** **v.** **United States**
Docketed:	May 16, 2017
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(16-1509)
Decision Date:	February 10, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
May 11 2017	Petition for a writ of certiorari filed. (Response due June 15, 2017)
Jun 08 2017	Order extending time to file response to petition to and including July 17, 2017.
Jun 12 2017	Brief amicus curiae of National Association for Public Defense filed.
Jul 17 2017	Brief of respondent United States in opposition filed.
Aug 01 2017	Reply of petitioner Terrence Byrd filed. (Distributed)
Aug 02 2017	DISTRIBUTED for Conference of 9/25/2017.
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Nov 13 2017	Brief of petitioner Terrence Byrd filed. **Main Document** **Certificate of Word Count** **Proof of Service**
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Nov 16 2017	Brief amicus curiae of Restore the Fourth, Inc. filed.

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Nov 17 2017	SET FOR ARGUMENT ON Tuesday, January 9, 2018
Nov 20 2017	Brief amici curiae of The American Civil Liberties Union and The National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of National Motorists Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
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Nov 20 2017	Brief amici curiae of Electronic Privacy Information Center (EPIC), et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
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Nov 20 2017	Brief amici curiae of Fourth Amendment Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 22 2017	CIRCULATED.
Dec 13 2017	Brief of respondent United States filed. (Distributed) **Proof of Service** **Main Document**
Dec 18 2017	Record requested from the U.S.C.A. 3rd Circuit.
Dec 20 2017	Brief amici curiae of Arizona, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 28 2017	Record received from the United States District Court Middle District of Pennsylvania (Harrisburg). The record is electronic.
Dec 28 2017	Record received from the U.S.C.A. 3rd Circuit is electronic, and contain some Sealed Documents.
Dec 28 2017	Reply of petitioner Terrence Byrd filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
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AND
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No.

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IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A police officer may not conduct a suspicionless and warrantless search of a car if the driver has a reasonable expectation of privacy in the car—i.e., an expectation of privacy that society accepts as reasonable. Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement?

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INTRODUCTION

This case squarely presents a question under the Fourth Amendment that has sharply divided the federal courts of appeals and likewise the state courts of last resort: Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

In February 2014, the Meadowlands, in East Rutherford, New Jersey, was host to Super Bowl 48. Suppose the local police, knowing that thousands of out-of-towners would be drinking and driving that weekend, decided to set up an elaborate network of sobriety checkpoints around town. Under Third Circuit law, the police would have been allowed to conduct full-vehicular searches of *every* rental car driven by an unlisted driver that they stopped that weekend, regardless of whether they had a warrant or any suspicion of a crime. The same is true in the Fourth, Fifth, and Tenth Circuits and two state supreme courts.

Over the ensuing two years, Super Bowls 49 and 50 took place in Glendale, Arizona and San Francisco, California, respectively. There, football fans could rest easy knowing they retained their Fourth Amendment rights against warrantless and suspicionless searches. For unlike the Third Circuit, the Ninth Circuit (like the Eighth and four state courts of last resort) holds that an unlisted driver has a reasonable expectation of privacy in a rental car as long as he has the renter's permission to drive the car.

Then came Super Bowl 51, held in Houston, Texas. There, the governing Fourth Amendment doctrine is woefully inconsistent, for in Texas, as in four other states, the state high court and applicable federal circuit court have reached opposite conclusions on the issue of whether an unlisted driver's expectation of privacy in a rental car is reasonable. Thus, football fans could have challenged warrantless and suspicionless searches of their vehicles there, if they were prosecuted in state court, but not if they were prosecuted in federal court.

Such is the elusive nature of the Fourth Amendment's protection against unreasonable searches under the law today. In the same jurisdiction, a defendant's critical constitutional rights can depend on whether he is ultimately prosecuted in state or federal court. And, putting the state courts aside, an unlisted driver who has the renter's permission to operate a rental car will be deemed to have a reasonable expectation of privacy in the car when he begins his trip in, say, Kansas City, *Missouri*, but as soon as he crosses into Kansas City, *Kansas*, poof!—his vital protection against a warrantless and suspicionless search of his car vanishes. This random patchwork of constitutional protections defies all logic and cries out for this Court's review.

Here, state troopers in Pennsylvania stopped Petitioner Terrence Byrd for a traffic violation while he was driving a car that his girlfriend had rented for him. Without a warrant or probable cause, the troopers searched Byrd's car and found contraband. Byrd moved to suppress the evidence obtained from the search because it violated the Fourth Amendment,

but the district court denied the motion on the ground that Byrd, as a driver not listed on the rental agreement, had no reasonable expectation of privacy in the car. The Third Circuit, while noting the circuit conflict, affirmed on the same basis.

That holding, reflecting the rule in the Third, Fourth, Fifth, and Tenth Circuits and two state high courts, is deeply misguided. In those jurisdictions, the police may conduct a search whenever they discover that an unlisted driver is operating a rental vehicle, even when they have no basis for believing that they will find evidence of a crime in the vehicle. That approach "creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). It also contravenes this Court's teaching that a person who legally obtains "dominion" and "control" over an area, and who may thereby "exclude others" from the area, has a reasonable expectation of privacy in the area. *Rakas v. Illinois*, 439 U.S. 128, 149 (1978). The Eighth and Ninth Circuits, and four state high courts, have correctly taken the opposite view.

The federal courts of appeals and state courts of last resort are openly and intractably divided over the question presented. As a consequence, judicial recognition of drivers' reasonable expectations of privacy in rental cars ultimately depends on the circuit and on the judicial system—state or federal—in which the case arises. This Court has repeatedly recognized a

need for uniform Fourth Amendment doctrine. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2491 (2014); *Thornton v. United States*, 541 U.S. 615, 623 (2004). Without this Court's intervention, the lack of a single, coherent answer to the question presented will continue to sow confusion among the lower courts in an area with serious implications for criminal defendants (not to mention targeted rental drivers who committed no crime) and for the even-handed administration of justice. This case squarely presents that important and recurring question and is an ideal vehicle for resolving the split of authority.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not officially reported but may be found at 2017 WL 541405. Pet. App. 1a–8a. The district court's ruling on the suppression motion is not officially reported but may be found at 2015 WL 5038455. Pet. App. 9a–18a.

JURISDICTION

The Court of Appeals entered judgment on February 10, 2017. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects,

> against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

State Troopers Search Byrd's Rental Car Without A Warrant Or Probable Cause

On September 17, 2014, Petitioner Terrence Byrd's girlfriend and mother of his children, Latasha Reed, rented a car from Avis in Wayne, New Jersey. Pet. App. 10a; C.A. App. 188-89.[1] The rental agreement specified that only the renter, the renter's spouse, co-employee, or a person who appears at the time of the rental and signs an additional form may operate the vehicle. Pet. App. 3a; C.A. App. 73 (rental agreement). Byrd was not listed on the rental agreement, but Reed gave him permission to drive the car. Pet. App. 3a, 10a, 13a. From the moment the couple left the rental-car facility, Byrd was the only person to drive the vehicle. C.A. App. 194.

Around 6:00 p.m. that day, Byrd was driving the rental car on Interstate 81 in Pennsylvania. Pet. App. 2a, 10a. State Trooper David Long, who was parked in the median monitoring traffic, noticed Byrd's car.

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[1] Pet. App. refers to Petitioner's Appendix included with this petition. C.A. App. refers to the Appendix submitted in the Court of Appeals.

Id. The trooper thought the car was "being driven suspiciously" for three reasons: (1) "the operator of the vehicle was driving with his hands in the 10:00 and 2:00 position," Pet. App. 10a, which is how most of us were taught to drive; (2) "his seat was reclined so that he was not clearly visible through the driver's side window," *id.* (punctuation omitted); and (3) the car was a rental, C.A. App. 88–90. The trooper stopped Byrd for violating a state traffic law requiring drivers to use the right-hand lane whenever possible. Pet. App. 2a; *see* 75 Pa. Cons. Stat. § 3313(d)(1). The trooper asked Byrd for his driver's license and the rental agreement. Pet. App. 3a. Upon producing the rental agreement, Byrd explained that his name was not listed on the agreement because Reed, whom Byrd called his "friend," had rented the car. Pet. App. 10a–11a.

After the trooper asked Byrd to move his car to a safer location, another state trooper arrived and joined Trooper Long in his patrol car. Pet. App. 3a. The troopers conducted a computerized search for Byrd's information, which showed that Byrd had a nonextraditable out-of-state warrant for a nonviolent crime. *Id.*; C.A. App. 98 (testimony of Trooper Long).

The troopers directed Byrd to exit the vehicle. Pet. App. 4a. They asked Byrd whether anything illegal was in the car. *Id.* Byrd replied that he had recently smoked a "blunt." *Id.* The troopers then asked for permission to search the car. But in the same breath, they informed him that his answer did not matter, because his name was not listed on the rental agreement, which deprived him of a reasonable expectation of privacy in the car. *Id.* Byrd offered to retrieve

the "blunt" himself, but the troopers declined the offer. Pet. App. 12a. The government has maintained that Byrd then consented to a search of the car. Pet. App. 4a; Brief in Opposition to Motion to Suppress Evidence at 2, No. 1:14-CR-321 (M.D. Pa. Apr. 28, 2015), ECF No. 31. Byrd denies that he consented. Pet. App. 8a; *see also* Second Brief in Support of Motion to Suppress at 26–29, No. 1:14-CR-321 (M.D. Pa. Aug. 21, 2015), ECF No. 54; Appellant's Brief at 24, No. 16-1509, 2016 WL 3382397 (3d Cir. Jun. 15, 2016). The troopers searched the car and found heroin and a bulletproof vest in the trunk. Pet. App. 4a; C.A. App. 47 (Trooper Long's police report).

The District Court Rules That Byrd May Not Challenge The Search Because He Had No Reasonable Expectation Of Privacy In The Rental Car

Byrd was initially charged in Pennsylvania state court. Those charges were dismissed after a federal grand jury returned a two-count indictment charging Byrd with distribution and possession with the intent to distribute heroin, 21 U.S.C. § 841(a), and possession of body armor by a prohibited person, 18 U.S.C. § 931(a)(1). C.A. App. 27–29.

Byrd moved to suppress the evidence obtained from the search because the search was supported neither by a warrant nor by any exception to the warrant requirement and therefore violated the Fourth Amendment. C.A. App. 30–36 (motion to suppress). At the suppression hearing, Byrd testified that Reed had given him permission to drive the rental car and that he had exclusive control over the vehicle from the

time Reed gave him the keys. C.A. App. 194. Byrd was therefore the only person in control of the car from around 10:30 a.m. until he was pulled over at approximately 6:30 p.m. C.A. App. 210 (rental agreement completed at 10:26 a.m.); C.A. App. 87 (stop occurred around 6:30 p.m.).

Trooper Long testified on direct examination that Byrd consented to a search of the rental vehicle. C.A. App. 102. But on recross examination, he clarified that what Byrd actually said was that he would retrieve the "blunt" from the car for the officers—a suggestion that the troopers refused—and that the troopers treated this suggestion as Byrd's expression of consent. C.A. App. 174 ("Q. And lastly, you indicated that when you asked [Byrd] for consent, at first he sort of said he would, but then he said, *no*, I'll get [the "blunt"] for you? And after that, you guys said, no, we'll get it? A. He said, I'll get it for you, yes. No one gets back—no one will retrieve any contraband. Q. Right. But after that, he *never gave you consent after that*, did he? A. *No*." (emphases added)). In a supplemental brief, Byrd emphasized that Trooper Long's testimony was equivocal and that the government had not demonstrated that Byrd had consented to the search or that any other exception to the warrant requirement applied. Second Brief in Support of Motion to Suppress at 22–25. The brief urged that the warrantless search was therefore unconstitutional. *Id.*

The district court denied suppression. Applying Third Circuit precedent, the district court ruled that Byrd did not have a reasonable expectation of privacy

in the rental car because he "was merely given permission by Reed to drive the car," "he was not a party to the rental agreement," and "he did not pay for the rental." Pet. App. 13a.

Byrd pled guilty to both charges in the indictment but reserved the right to appeal the denial of his suppression motion. C.A. App. 213–33 (plea agreement). The district court accepted the conditional plea, entered judgment, and sentenced Byrd to ten years in prison. C.A. App. 13–14 (district court's judgment).

The Third Circuit Agrees That Byrd Did Not Have A Reasonable Expectation Of Privacy In The Rental Car

The Third Circuit affirmed. The Court of Appeals stressed that "[a] circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy" when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement. Pet. App. 8a. The court then held that Byrd's case was controlled by the Third Circuit's earlier decision in *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011). Pet. App. 8a.

In *Kennedy*, the Third Circuit began by observing that unlisted drivers have no "cognizable property interest" in rental vehicles and therefore do not have an "accompanying right to exclude." 638 F.3d at 165. From this observation, the court inferred that "society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company." *Id.* at 167–

68. On this basis, the Third Circuit in *Kennedy* concluded that "the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy." *Id.* at 165.

Citing *Kennedy*, the panel here held that Byrd had no reasonable expectation of privacy in the rental car because he was not listed as an authorized driver on the rental agreement. Pet. App. 8a. And because Byrd lacked a reasonable expectation of privacy, the Third Circuit explained, it did not need to decide whether Byrd had consented to the search. *Id.*

REASONS FOR GRANTING THE WRIT

To claim the protection of the Fourth Amendment, a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). The federal courts of appeals and the state courts of last resort are openly divided over the question whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. That division of authority is deeply entrenched, and the question by now has had more than enough time to percolate. This case squarely presents this important and recurring question and is an ideal vehicle for answering it. This Court should therefore use this case to resolve the conflict.

I. The Question Presented Has Irreconcilably Divided The Courts Of Appeals And State Courts Of Last Resort.

Seven federal circuits and six state courts of last resort have addressed the question presented and have reached two diametrically opposed conclusions—with two circuits and four state high courts on one side and four circuits and two state high courts on the other—plus a Solomonic middle position that one circuit follows. As a result, courts have openly acknowledged the deep fissure between jurisdictions. *See, e.g.*, Pet. App. 8a ("A circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement."); *United States v. Thomas*, 447 F.3d 1191, 1196–97 (9th Cir. 2006) ("Courts have developed at least three approaches to determining when an unauthorized driver of a rental vehicle has standing to challenge a search."); *United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) ("we note the existence of a circuit split over whether an unauthorized rental-car driver has a legitimate expectation of privacy sufficient to establish standing to challenge a search."); *State v. Nelson*, 807 N.W.2d 769, 779 (Neb. 2011) ("courts have developed [three approaches] to determine when an unauthorized driver of a rental vehicle has standing to challenge a search."). This Court's resolution is now warranted to bring certainty to this confused and consequential area of Fourth Amendment law.

A. The Eighth and Ninth Circuits and four state high courts hold that a driver has a reasonable expectation of privacy in a rental car if he has the renter's permission to drive the car.

The Eighth Circuit holds that the reasonableness of an unlisted driver's expectation of privacy in a rental car depends on whether he can show that the renter gave him permission to operate the car. In *United States v. Muhammad*, the court emphasized that evidence of the renter's permission would establish a sufficiently direct connection between an unlisted driver and the renter to support the unlisted driver's expectation of privacy in the car. 58 F.3d 353, 355 (8th Cir. 1995) (citation omitted). The Eighth Circuit reiterated in *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998), that "if [the unlisted driver] had [the renter's] permission to use the automobile ... [he] would have a privacy interest giving rise to standing" to challenge the vehicle's search.[2]

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[2] Before *Rakas*, this Court analyzed an individual's ability to claim Fourth Amendment protections under the rubric of "standing." In *Rakas*, the Court clarified that the inquiry "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing," 439 U.S. at 140, and that ultimately "[t]he inquiry under either approach is the same," *id.* at 139. Thus, subsequent decisions have asked whether a defendant had a "legitimate expectation of privacy" in the area searched. *Carter*, 525 U.S. at 88. Nonetheless, "standing" continues to be used as a shorthand for having a sufficient interest to challenge a search or seizure. *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 332 (2009) ("A passenger," who is seized by a stop, "has standing to challenge a stop's constitutionality.").

The Ninth Circuit agrees that "[a]n unauthorized driver may have standing to challenge a search if he or she has received permission to use the [rental] car." *Thomas*, 447 F.3d at 1199; *see Lyall v. City of Los Angeles*, 807 F.3d 1178, 1189 (9th Cir. 2015). In support of that conclusion, the Ninth Circuit observed that a renter's consent gives an unlisted driver control of the car as well as the right to exclude unwanted passengers. *Thomas*, 447 F.3d at 1198. This right creates a possessory interest in the car and makes the driver's expectation of privacy reasonable. *Id.* at 1198–99 (citation omitted). The Ninth Circuit has also found support for this holding in analogous cases where defendants maintained their privacy interests despite violating their lease agreements. *Id.* at 1198 (citing *United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2001) (renter had privacy interest in rental car after expiration of rental agreement); *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001) (expiration of motel room lease period did not terminate privacy interest in room)).

The Nebraska Supreme Court has reached the same conclusions as the Eighth and Ninth Circuits. The court explained that its "cases show the importance of dominion and control and that standing is not limited to property rights or ownership." *Nelson*, 807 N.W.2d at 780. Thus, it declared, "[i]n accordance with the Eighth and Ninth Circuits, we hold that a driver of a rental vehicle may have standing to challenge a detention or search if he or she has demonstrated that he or she has received permission to drive the vehicle from the individual authorized on the rental agreement." *Id.*

Likewise, citing the Eighth Circuit's decision in *Muhammad*, the New Mexico Supreme Court holds that an unlisted driver who can demonstrate that he had the renter's permission to drive a rental car has a reasonable expectation of privacy in the car. *State v. Van Dang*, 120 P.3d 830, 834 (N.M. 2005). In New Mexico, "in a case involving a rental vehicle where the driver is neither the renter nor listed on the rental contract as an authorized driver, the burden is on the driver to present evidence of consent or permission from the lawful owner *or renter* to be in possession of the vehicle in order to establish standing to challenge a search of the vehicle." *Id.* (emphasis added).

Texas's Court of Criminal Appeals is on the same page. It has analogized the renter of a car to the car's owner and, on that basis, has held that when a renter gives permission to an unlisted person to drive a car, the renter confers on the driver a reasonable expectation of privacy in the car. *Parker v. State*, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006). On facts almost identical to this case, the court explained that "society would recognize as reasonable [the defendant's] expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement." *Id.* And, relying substantially on *Parker*, Oklahoma's highest criminal appellate court has reached the same conclusion. *State v. Bass*, 300 P.3d 1193, 1196 (Okla. Crim. App. 2013).

These courts—two federal courts of appeals and four state courts of last resort—have concluded that the terms of a rental agreement are not determinative of which expectations of privacy society is prepared to

accept as reasonable. In each of these jurisdictions, Byrd would have been allowed to challenge the unjustified search of his car based on the uncontroverted evidence that he had his girlfriend's permission to use the car.

B. The Third, Fourth, Fifth, and Tenth Circuits and two state high courts hold that an unlisted driver does not have a reasonable expectation of privacy in a rental car.

Diametrically opposed to the above six courts are another six. The rule the Third Circuit followed here is representative of this camp in holding that a driver not listed on a rental agreement has no "right to exclude" because he has "no cognizable property interest in the rental vehicle." *Kennedy*, 638 F.3d at 165. Accordingly, in the Third Circuit's view, as its decision in this case reflects, an unlisted driver generally has no reasonable expectation of privacy in a rental car. *Id.* at 167–68; Pet. App. 8a.

The Fourth Circuit has reached the same conclusion, grounding its analysis on the lack of a direct relationship between the unlisted driver and the rental company. *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994). In *Wellons*, the Fourth Circuit held that an unlisted driver of a rental car "had no legitimate privacy interest in the car and, therefore, the search of which he complains cannot have violated his Fourth Amendment rights." *Id.* at 119. The court emphasized that, although the defendant "may well have had [the renter's] permission to drive the automobile, he did

not have the permission of Hertz Corporation, the owner of the automobile." *Id.* at 119 n.2.

The Fifth Circuit's analysis is much the same. That court has held that an unlisted driver lacked a reasonable expectation of privacy in a rental car because the "express terms of the rental agreement" prohibited unauthorized drivers. *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990); *accord United States v. Seeley*, 331 F.3d 471, 472 (5th Cir. 2003).[3]

Similarly, the rule in the Tenth Circuit is that an unlisted driver does not have a reasonable expectation of privacy in a rental car because he does not have the rental company's permission to operate the car. *United States v. Obregon*, 748 F.2d 1371, 1374–75 (10th Cir. 1984). The Tenth Circuit relied among other things on the district court's finding in that case that "Defendant made no showing that any arrangement had been made with the rental car company that would have allowed him to drive the car legitimately." *Id.* at 1374; *see also United States v. Roper*, 918 F.2d 885, 887 (10th Cir. 1990) (following

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[3] In *United States v. Kye Soo Lee*, the Fifth Circuit held that a driver had a reasonable expectation of privacy in a rental vehicle because he had the renter's permission to drive it. 898 F.2d 1034, 1038 (5th Cir. 1990). Shortly after that decision, however, the Fifth Circuit decided *United States v. Boruff*, which reached the opposite conclusion. 909 F.2d at 117. The Fifth Circuit has since distinguished *Kye Soo Lee* on the ground that it did not mention whether the terms of the rental agreement prohibited use by unlisted drivers and has made clear that *Boruff* controls. *Seeley*, 331 F.3d at 472 n.1. Here, as in *Seeley*, the terms of the rental agreement purported to prohibit unlisted drivers. C.A. App. 73–74; *see also Seeley*, 331 F.3d at 472.

Obregon); *United States v. Edwards*, 632 F.3d 633, 641 (10th Cir. 2001) (same).

At least two state courts of last resort see things this way, too. Like the Third Circuit, the Montana Supreme Court holds that an unlisted driver of a rental car does not have a right to exclude others and therefore "does not have a reasonable expectation of privacy" in the car. *State v. Hill*, 94 P.3d 752, 758 (Mont. 2004). As the Montana Supreme Court has reiterated, "in [*Hill*] ... we held that an unauthorized driver of a rental car does not have a reasonable expectation of privacy in the contents of the car." *State v. Clark*, 198 P.3d 809, 816 (Mont. 2008).

The Arkansas Supreme Court follows a similar approach. That court holds that a renter's permission to a third person to drive a car is "not effective [if] the [rental] contract did not allow for other drivers to use the vehicle." *Wilson v. State*, 2014 Ark. 8, 9 (2014).[4]

Despite his exclusive control over the rental car and Reed's permission for him to use it, these jurisdictions would not deem Byrd to have a reasonable expectation of privacy in the rental car and therefore would not permit him to challenge the troopers' search, in direct conflict with the rule in the Eighth

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[4] The Wyoming Supreme Court, citing *Wellons*, *Boruff*, and *Obregon*, has also noted that "an unauthorized operator of a rental car generally ... lacks standing." *Hembree v. State*, 143 P.3d 905, 909 (Wyo. 2006). But that decision was ultimately about the propriety of searches of containers held within a rental car, so we have not included it for purposes of setting out the underlying conflict.

and Ninth Circuits and the state courts in Nebraska, New Mexico, Texas, and Oklahoma.

C. The Sixth Circuit applies a totality of the circumstances test to determine whether an unlisted driver has a reasonable expectation of privacy in a rental car.

There is also a third approach to the question presented. The Sixth Circuit applies a "totality of the circumstances" test to decide whether an unlisted driver has a reasonable expectation of privacy in a rental car. *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001). "In considering the reasonableness of asserted privacy expectations," that court has stated, "no single factor invariably will be determinative." *Id.* (citing *Rakas*, 439 U.S. at 152 (Powell, J., concurring)). The court there examined, among other factors, whether the unlisted driver had a driver's license, whether he had permission to use the car, and the nature of his relationship to the renter. *Id.* Because the unlisted driver had a license and permission from the renter, who was his wife, the court concluded that he had standing to challenge the search.[5]

Had Byrd been pulled over just across the Pennsylvania state line, in Ohio, he almost certainly would have been allowed to contest the search, as he had a

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[5] Outside of the rental context, the First Circuit has applied a "totality of the circumstances" approach to determine whether a driver who borrowed a car from the owner's boyfriend had a reasonable expectation of privacy in the car. *See United States v. Sanchez*, 943 F.2d 110, 113–14 (1st Cir. 1991).

driver's license, permission to drive the car, and a familial connection to the renter. C.A. App. 188 (Reed is the mother of Byrd's children).

II. The Question Presented Is Important And Recurring, And The Division Of Authority Is Deeply Entrenched.

A. The question presented is important.

Resolution of the question presented is critical for two reasons.

First, car rentals are pervasive and growing, affecting millions of drivers. In 2016, traditional rental-car companies had over 2.3 million cars in their inventory, Auto Rental News, *2016 U.S. Car Rental Market*, http://tinyurl.com/loeucnj, up from 1.8 million in 2008, Auto Rental News, *2008 U.S. Car Market*, http://tinyurl.com/k5xzn49. In 2015 alone, there were over 115 million car rentals in the United States. Canadean, Car Rental in the US to 2020: Databook, 24 (Published August, 2016, Reference Code: TT1972DB). And car-sharing services, like Zipcar, that allow drivers to rent cars by the hour are becoming increasingly popular. Neal E. Boudette, *Car-Sharing, Social Trends Portend Challenge for Auto Sales*, Wall St. J., Feb. 3, 2014, http://tinyurl.com/l3xrvsy (noting threefold increase in carsharing membership between 2008 and 2014). As short-term car rental becomes an increasingly attractive alternative to car ownership, the frequency of police stops involving an unlisted driver will only increase. It also bears emphasis, as this case illustrates, that some police even

target rental cars for stops and warrantless searches. C.A. App. 88–90.[6]

Second, the split has created an unworkable rift both *between* jurisdictions and *within* jurisdictions. The division of authority subjects interstate drivers to arbitrary fluctuations in their Fourth Amendment rights. Under the law as it currently stands, the Fourth Amendment's protections are elusive. An unlisted driver who has the renter's permission to drive a rental car will be deemed to have a reasonable expectation of privacy in the car if he begins his trip in Kansas City, *Missouri*. *See Best*, 135 F.3d at 1225. But as soon as he crosses into Kansas City, *Kansas*, his vital protection against a warrantless and suspicionless search of his car vanishes. *See Roper*, 918 F.2d at 887–88. The intercircuit conflict here is untenable in light of this Court's admonition that the "search and seizure protections of the Fourth Amendment" should not "vary from place to place and from time to time." *Whren v. United States*, 517 U.S. 806, 815 (1996).

Worse still, in at least five states, the rules in the *same* place, at the *same* time are conflicting. In Texas, Oklahoma, and New Mexico, an unlisted driver, with the renter's consent to drive a rental car, has a rea-

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[6] In one notorious example, Maryland state police stopped Judge Robert Wilkins (then a public defender) and his family while they were returning from a funeral in a rental car. Robert L. Wilkins et al., *Addressing Declining Rights in an Era of Declining Crime*, 9 J.L. & Pol'y 215, 232–35 (2001). The officers unsuccessfully sought consent and then searched the car anyway because, in their view, "there were many problems with rental cars and drugs on the highway." *Id.* at 234.

sonable expectation of privacy in the car, if he is prosecuted in *state* court, but not if he is prosecuted in *federal* court. *Compare Parker*, 182 S.W.3d at 927; *Bass*, 300 P.3d at 1196; *Van Dang*, 120 P.3d at 834–35 *with Seeley*, 331 F.3d at 472; *Roper*, 918 F.2d at 887–88. The same is true in Arkansas and Montana, except the state and federal courts' positions are reversed. *Compare Best*, 135 F.3d at 1225; *Thomas*, 447 F.3d at 1198–99 *with Wilson*, 2014 Ark. at 9; *Clark*, 198 P.3d at 816.

How is an officer stopping a rental car in these jurisdictions to know whether he can conduct a search? Follow the law of the jurisdiction that hired him? Follow the less intrusive rule—or the most permissive? Predict whether the driver is more likely to be guilty of a state crime or a federal one? In the latter scenario, what is an officer to do about the substantial overlap between state and federal enforcement of certain crimes, particularly drug and weapons crimes? Byrd himself was initially charged in state court and later charged in federal court. *See supra* at 7.

B. The question presented is recurring.

The question presented arises with great frequency. Beyond the decisions described above, numerous lower state court, federal district court, and unpublished federal circuit court decisions have grappled with the issue and continue to do so. Some of these decisions follow the position adopted by the

Eighth and Ninth Circuits;[7] others reflect the rule in the Third, Fourth, Fifth, and Tenth Circuits;[8] and still

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[7] *See, e.g.*, *United States v. Pinex*, 129 F. Supp. 3d 982, 990 (D. Mont. 2015); *United States v. King*, 560 F. Supp. 2d. 906, 914 (N.D. Cal. 2008); *United States v. Virden*, 417 F. Supp. 2d 1360, 1368 n.8 (M.D. Ga. 2006); *United States v. Rios*, No. 05-40005-02-SAC, 2005 U.S. Dist. LEXIS 31992, at *18–19 (D. Kan. Dec. 2, 2005); *United States v. Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996); *State v. Wasbotten*, 372 P.3d 1016, 1018 (Ariz. Ct. App. 2016); *People v. Ruffin*, 734 N.E.2d 507, 512–13 (Ill. App. Ct. 2000); *State v. Webber*, No. 90,899, 2005 WL 283585, at *3–4 (Kan. Ct. App. Feb. 4, 2005); *Commonwealth v. Artis-Bryan*, No. 1225 CR 2012, 2013 Pa. Dist. & Cnty. Dec. LEXIS 521, at *9–10 (Pa. Ct. C.P. Monroe Aug. 13, 2013).

[8] *See, e.g.*, *United States v. Mebrtatu*, 543 F. Appx. 137, 139–40 (3d Cir. 2013); *United States v. Norman*, 465 F. Appx. 110, 115–16 (3d Cir. 2012); *United States v. Luster*, 324 F. Appx. 224, 225 (4th Cir. 2009); *United States v. Mincey*, 321 F. Appx. 233, 239–41 (4th Cir. 2008); *United States v. Wenqiang Bian*, No. 16-20026-CR-WILLIAM/SIMONTON, 2016 WL 2342631, at *7 (S.D. Fla. Apr. 29, 2016); *United States v. Woodley*, No. 13-113, 2015 WL 5136173, at *4–5 (W.D. Pa. Sept. 1, 2015); *United States v. Mobley*, No. 3:14cr122, 2014 WL 6791425, at *7 n.22 (E.D. Va. Nov. 25, 2014); *United States v. Van Praagh*, No. 1: (S3) 14 Cr. 189 (PAC), 2014 WL 4954162, at *3, 7 (S.D.N.Y. Oct. 1, 2014); *United States v. Akinola*, Crim. Action No. 11.310(JLL), 2013 WL 1103702, at *8–9 (D.N.J. Mar. 15, 2013); *United States v. McCoy*, No. 2:12-CR-218 TS, 2013 WL 3289124, at *2 (D. Utah Jun. 27, 2013); *United States v. Goode*, Criminal Nos. 11-204-1, 11-204-2, 11-204-3, 2011 WL 6302553, at *3 (E.D. Pa., Dec. 16, 2011); *United States v. Sutmiller*, No. CR-11-171-C, 2011 WL 2636542, at *2–3 (W.D. Okla. Jul. 6, 2011); *United States v. Vaughns*, 202 F. Supp. 2d 572, 576 (E.D. Tex. 2001); *United States v. Taddeo*, 724 F. Supp. 81, 84–85 (W.D.N.Y. 1989); *State v. Josey*, No. H14HCR040584348, 2005 WL 1754677, at *5 (Conn. Super. Ct. May 24, 2005); *Colin v. State*, 646 A.2d 1095,

others are aligned with the Sixth Circuit's analysis.[9] Some address the question without endorsing a particular approach.[10] And these decisions likely represent only a small fraction of the instances in which police have conducted warrantless and suspicionless searches of rental cars on the theory that the driver had no reasonable expectation of privacy in the vehicle, as cases usually do not get to court unless the police uncover evidence of a crime.

C. The division of authority is deeply entrenched.

There is no need at this point for additional percolation in the lower courts. The division of authority is now firmly entrenched.

The three camps outlined above present completely different ways of thinking about the problem. On one side of the split, courts hold that a renter's

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1099–1100 (Md. Ct. Spec. App. 1994); *State v. Toolen*, 945 S.W.2d 629, 632 (Mo. Ct. App. 1997).

[9] *See, e.g.*, *United States v. Delille*, No. 2:15-cr-88, 2016 WL 236464, at *8–9 (D. Vt. Jan. 19, 2016); *United States v. Hermiz*, 42 F. Supp. 3d 856, 864–65 (E.D. Mich. 2014); *United States v. Warren*, 39 F. Supp. 3d 930, 933–34 (E.D. Mich. 2014); *United States v. Resa*, 552 F. Supp. 2d 720, 730 (E.D. Tenn. 2008); *State v. Cutler*, 159 P.3d 909, 912–13 (Idaho Ct. App. 2007).

[10] *See, e.g.*, *United States v. Alexis*, 169 F. Supp. 3d 1303, 1310 (S.D. Fla 2016); *United States v. Dennis*, No. 06-650-01, 2007 WL 2173394, at *3, 6 (E.D. Pa. Jul. 27, 2007); *Cooper v. State*, 162 So. 3d 15, 18 (Fla. Dist. Ct. App. 2014); *Commonwealth v. Jones*, 874 A.2d 108, 120 (Pa. Super. Ct. 2005).

permission gives an unlisted driver a reasonable expectation of privacy in the car, either due to the unlisted driver's possession of the car, *Thomas*, 447 F.3d at 1199, or based on an analogy to an owner's consent to use the car, *Parker*, 182 S.W.3d at 927. On another side of the divide, courts have ruled that a reasonable expectation of privacy in a rental car requires an unbroken chain of authorization that can be traced to the holder of the vehicle's legal title. *Kennedy*, 638 F.3d at 165; *Wellons*, 32 F.3d at 119 n.2. On the third side, the Sixth Circuit believes each case must be evaluated on the totality of the circumstances. *Smith*, 263 F.3d at 586. This disagreement is fundamental and will not dissipate. As noted, courts now openly acknowledge the split of authority. *See, e.g.*, Pet. App. 8a; *Thomas*, 447 F.3d at 1196–97; *Sanford*, 806 F.3d at 958; *Nelson*, 807 N.W.2d at 779; *supra* at 11. And recent decisions have added no new analysis. Instead, they have merely canvassed the opposing camps and chosen a side. *See, e.g.*, *Van Praagh*, 2014 WL 4954162, at *7; *Nelson*, 807 N.W.2d at 778–80.

Only this Court can decide which of these conflicting views is correct. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459–60 (1981). This Court's intervention is therefore necessary to provide much-needed guidance to lower courts, law enforcement officers, and interstate travelers.

III. This Case Is An Ideal Vehicle For Answering The Question Presented And Resolving The Conflict.

This case presents a perfect opportunity for this Court to determine whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. Here, unlike earlier cases raising the same issue, that question is directly presented and outcome-determinative.

Although federal and state courts regularly address cases involving similar facts—and although the issue will likely arise with increasing frequency as car rentals and carsharing become more prevalent—the question presented is often shielded from this Court's review, because it is not outcome-determinative. One reason for that is that the police sometimes call the rental company to request the company's permission to search or impound the vehicle. *See Mincey*, 321 F. Appx. at 236 & n.2 (rental company gave officers consent to search the car), *cert. denied*, 558 U.S. 945 (2009) (No. 08-1482); *Kennedy*, 638 F.3d at 161–62, 168 (rental company gave police consent to impound the car), *cert. denied*, 565 U.S. 1110 (2012) (No. 10-11094); *People v. Bower*, 685 N.E.2d 393, 395 (Ill. App. Ct. 1997) (same), *cert. denied*, 524 U.S. 905 (1998) (No. 97-1720); *see also Luster*, 324 F. Appx. at 225, 226 (impoundment and inventory search), *cert. denied*, 558 U.S. 1077 (2009) (No. 09-5734). While the defendant in such cases may nonetheless be permitted to challenge the search, the challenge will often confront the government's additional argument that the police obtained valid consent from the car's legal owner. *See*

Woodley, 2015 WL 5136173, at *4–5; *Hill*, 94 P.3d at 758–59.

Here, by contrast, the troopers did not call the rental company to seek authorization for the search. Instead, the sole justification for the search was Byrd's asserted consent, which he disputed both in the district court and in the Court of Appeals. And the Third Circuit's only basis for rejecting that challenge was that Byrd lacked a reasonable expectation of privacy in the rental car because he was not listed in the rental agreement.[11]

In addition, in many instances it will be unclear from the record whether the defendant actually had the renter's permission to drive the car. *See, e.g.*, *Thomas*, 447 F.3d at 1199 (rejecting Fourth Amendment challenge because the defendant "failed to show that he received [the renter's] permission to use the car"); *Van Dang*, 120 P.3d at 834–35 (same). But here the district court specifically found, and the government has not disputed, that Reed gave Byrd permission to drive it. Pet. App. 13a. The reasonable-expectation-of-privacy question was thus controlling and dispositive of the Court of Appeals' analysis.

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[11] The government has not argued, and no court has found, that the troopers had probable cause to search Byrd's car, let alone that they had probable cause to search the trunk.

IV. The Third Circuit Erred In Holding That An Unlisted Driver Cannot Have A Reasonable Expectation Of Privacy In A Rental Car.

The Third Circuit's holding here means that the police may search a rental vehicle virtually any time it is operated by an unlisted driver, without any particular suspicion of criminal activity and without a court-issued warrant. That approach "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. The Third Circuit's holding is fundamentally misguided and should not be allowed to stand.

Under the proper analysis, an unlisted driver has standing to challenge the search of a rental car so long as he has the renter's permission to operate the car. No one would infer from the fact that a driver is not listed on a rental agreement that he has thereby offered his belongings up for "public inspection." *California v. Greenwood*, 486 U.S. 35, 41 (1988). Instead, a driver who has the renter's permission to drive a rental car exercises "dominion" and "control" over the car and has the authority to "exclude others," whether or not he is listed on the rental agreement. *Rakas*, 439 U.S. at 149. And the driver's control and authority to exclude others give him an expectation of privacy in the car that society accepts as reasonable.

A. The decision below disregards expectations of privacy that society accepts as reasonable.

The decision below relies exclusively on the Third Circuit's previous decision in *Kennedy*, 638 F.3d 159. In that case, the court opined that an unlisted driver of a rental car has "no cognizable *property* interest" in the car or an "accompanying right to exclude" because he does not have the owner's permission to operate the car. *Id.* at 165 (emphasis added). On this basis, the Court of Appeals concluded that "society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company." *Id.* at 167–68.

This reasoning does not withstand scrutiny. The terms contained in standard form contracts are not useful proxies for society's "widely shared social expectations" of privacy. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). Indeed, a commercial actor's efforts to encourage or discourage certain conduct have nothing to do with the expectations of privacy that society is prepared to accept as reasonable.

Suppose, for example, that an apartment lease generally permits subleasing but prohibits subleasing to anyone with pets—perhaps to prevent cosmetic damage to the apartment's interior. For an owner wishing to protect her property, such a lease condition is perhaps reasonable. But it is also manifestly irrelevant to society's expectations of privacy. No court anywhere would believe that the police may conduct a warrantless and suspicionless search of an apartment

simply because the subtenant has a Yorkshire terrier. And that is true even though the property owner may have *expressly forbidden* any subtenants who own pets—and therefore has the right to evict the subtenant. Likewise, when Dad hands Junior the keys to his car, the kid has an expectation of privacy no matter whether Dad owns the car or has a long-term lease that prohibits drivers under 21.

The same is true with respect to a lease's duration. A hotel guest does not forfeit her privacy interest if she sleeps through her alarm and fails to check out on time. *See Dorais*, 241 F.3d at 1129 ("[T]he mere expiration of the rental period ... does not automatically end a lessee's expectations of privacy [in a motel room]."); *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (guest's reasonable expectation of privacy extended past check-out time). Nor does a renter lose a reasonable expectation of privacy in a rental car the moment that the rental agreement expires. *Henderson*, 241 F.3d at 647 (reasonable expectation of privacy survived expiration of car lease); *United States v. Cooper*, 133 F.3d 1394, 1400–02 (11th Cir. 1998) (same). In each of these contexts, the reasonable expectation of privacy persists—despite the owner's right to evict—just as it persists when a home renter overstays his lease term (or fails to pay rent on time) and therefore can be evicted at the landlord's option.

As in each of these contexts, the contractual requirement that rental-car drivers be listed in the rental documents is unrelated to social norms concerning who has a reasonable expectation of privacy and when. Instead, that term is the product of rental-

car companies' desire to protect their capital investment in their vehicles, minimize their insurance premiums, and collect additional-driver fees.

And, as in the hypothetical scenario involving the apartment lease, making the verbiage of rental contracts dispositive of the Fourth Amendment inquiry would yield absurd results. Car-rental contracts often purport to extinguish a driver's right to operate the car upon *any* breach of the contract's terms, *see, e.g.*, *State v. $129,970.00*, 161 P.3d 816, 821 (Mont. 2007) (rental contract allowed owner to "repossess the car anytime it is ... being used to violate ... the terms of [the rental] agreement"), including infractions as minor as refueling the vehicle with the wrong kind of gas or not wearing a seatbelt. *See United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014) (noting these examples as conduct that would make a rental agreement voidable). Yet because "[s]ociety is willing to recognize a privacy interest in a car even if the driver does not mind her P's and Q's at all times," *id.*, no one seriously thinks that a renter loses her reasonable expectation of privacy merely by violating any of these boilerplate provisions.

A proper inquiry into the actual norms of rental-car use would show that rental cars driven by unlisted drivers are commonplace and that society accepts as reasonable an unlisted driver's expectation of privacy in the car. There are many entirely quotidian reasons that a driver may not be listed on a rental agreement. The driver's flight might have arrived later than the renter's, so he was not present at the time of the rental at the airport; he might not have anticipated his need to drive; he might be old enough to drive, but

not old enough to rent a car; he might not own a credit card; or he might be too broke to afford the additional-driver fee. And the potential reasons that an unlisted driver may subsequently need to get behind the wheel of a rental car are equally numerous and equally ordinary. The driver might need to fill in for a renter who is sick or fatigued; he might be more comfortable than the renter driving at night or in heavy rain; he might drive while the renter maps the route; or he might serve as the designated driver after his colleague has had one cocktail too many.

The average person would be surprised to learn that, in the Third Circuit and other like-minded jurisdictions, the police are free to conduct a warrantless and suspicionless vehicle search in *any* of these scenarios. When you place your effects in the trunk of a car and get behind the steering wheel, you think your effects are safe from prying eyes and the intrusions of others. You don't authorize strangers to rummage through your belongings. And you certainly don't think you're inviting the police to conduct a search without a warrant and without any suspicion of a crime. All of that is true whether or not you are listed on the rental car agreement.

The Constitution's protections do not turn on compliance with fine print in boilerplate agreements. The scope of the Fourth Amendment should therefore not be pinned to the vagaries of commercial contract formation.

B. The decision below contravenes this Court's teaching that a reasonable expectation of privacy does not require a property right in the area searched.

The Third Circuit's analysis also goes awry by requiring a challenger to have a *property* right in the area searched in order to have a right to exclude. That approach contravenes this Court's instruction that "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control" in this area, and "[e]xpectations of privacy protected by the Fourth Amendment ... need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Rakas*, 439 U.S. at 143 & n.12. Indeed, this Court has held that a person who "*possesses*" or "*controls*" property has a right to exclude and therefore has a reasonable expectation of privacy on that basis. *Id.* (emphasis added).

In *Rakas*, this Court held that several passengers, who had "*neither* a property *nor* a possessory interest in the automobile," did not have a reasonable expectation of privacy in a car and therefore could not challenge a search of the car. *Id.* at 148–49 (emphases added). The Court distinguished that setting from cases involving defendants with possessory interests in the area searched. *Id.* Social guests in a home, for example, have no *property* interest in the area searched but nonetheless have reasonable expectations of privacy because they *control* the area and may exclude most others. *Id.* at 149 (citing *Jones v. United States*, 362 U.S. 257 (1960)). Likewise, callers in pub-

lic phone booths have reasonable expectations of privacy with respect to the content of their conversations, despite the fact they neither lease nor own the booths. *Id.* (citing *Katz v. United States*, 389 U.S. 347 (1967)); *see also Thomas*, 447 F.3d at 1198 ("a defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of 'joint control' or 'common authority' over the property searched."). And this is true even though the premises' owner maintains a right to exclude that is *superior* to the challenger's. *See Rakas*, 439 U.S. at 149 ("Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it.").

An unlisted driver has a reasonable expectation of privacy in the car for the same reasons, even though he has no contractual right to drive or property right in the car. *Cf. Rakas*, 439 U.S. at 154 (Powell, J., concurring) (distinguishing "between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile"). Just as the overnight guest in *Jones* "had permission to use the apartment," "had a key to the apartment," and "kept possessions in [it,]" *Rakas*, 439 U.S. at 149, Byrd had the renter's permission to drive, kept possessions in the car, and exercised exclusive dominion and control over it as soon as he left the rental company's facility. C.A. App. 194 (Reed turned the car over to Byrd immediately after leaving the rental-car facility).

Moreover, Byrd's possession of the rental car was "lawful"—i.e., not "wrongful"—as this Court has used those terms. *Rakas* explained its use of those terms

by reference to *criminal* offenses, not mere breaches of private agreements. *See* 439 U.S. at 141 n.9 (noting that "wrongful" presence at the scene of a search, such as a person driving a stolen car, would not enable a defendant to object to a search); *id.* at 143 n.12 (noting that a burglar's presence at a house is "wrongful" (so not "lawful") and would therefore not confer standing to challenge a search of the house). Byrd's possession of the rental car was therefore not "wrongful" in the relevant sense because, as the courts have explained, operating a rental car without the rental company's permission does not by itself constitute a crime. *E.g.*, *Smith*, 263 F.3d at 587; *Cooper*, 133 F.3d at 1402; *United States v. Riazco*, 91 F.3d 752, 754 (5th Cir. 1996).

In overly focusing its analysis on the absence of a "property" right, the Third Circuit's approach thus undermines important constitutional protections and misapprehends this Court's precedents. The Court should grant the petition and hold that a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 16-1509

UNITED STATES OF AMERICA
v.
TERRENCE BYRD,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. No. 1-14-cr-00321-001)
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit L.A.R.
34.1(a)
December 6, 2016

Before: FISHER*, KRAUSE and MELLOY**,
Circuit Judges.
(Filed: February 10, 2017)
OPINION***

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* Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

** Honorable Michael J. Melloy, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

*** This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

MELLOY, *Circuit Judge.*

Terrence Byrd entered a conditional guilty plea to charges of possessing heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possessing body armor as a prohibited person in violation of 18 U.S.C. § 931(a)(1). He reserved the right to appeal several suppression rulings. He now appeals, arguing: (1) the initial traffic stop was pretextual and the District Court clearly erred in accepting the officer's testimony describing a traffic violation; (2) officers impermissibly extended the stop; and (3) the District Court erred by holding Byrd lacked standing to challenge the vehicle search. We affirm the judgment of the District Court.

I.

Byrd was driving a rental car on a four-lane divided highway near Harrisburg, Pennsylvania. A state police officer parked in the median recognized Byrd's car as a rental and noticed the driver's seat was reclined to an unusual degree such that the driver was not clearly visible. The officer followed Byrd and eventually pulled Byrd over. The officer claimed he observed Byrd violate a state law requiring drivers to limit use of the left-hand lane to passing maneuvers. 75 Pa. Con. Stat. § 3313(d)(1)(i)-(ii).[1] According to the officer, Byrd passed two trucks

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[1] The code section at issue provides:

(d) Driving in right lane.—

(1) Except as provided in paragraph (2) and unless otherwise posted, upon all limited access highways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the

with room to move into the right lane between the trucks, but he failed to do so, remaining instead in the left lane for the extended passing procedure.

When the officer approached Byrd's stopped car and asked for Byrd's license and the rental agreement, Byrd appeared nervous and conspicuously avoided opening a center console even though Byrd had difficulty locating the requested documents. Eventually, Byrd produced an interim New York driver's license that did not include a photo. Byrd also produced the rental agreement. The rental agreement did not list Byrd as the renter or as a permissive driver.

The officer recognized the vehicles were stopped at an unsafe location and asked Byrd to move his car. Byrd complied. When the officer checked Byrd's license number, date of birth, and name, the computer returned the name James Carter. A second officer then arrived, and the officers continued to attempt to sort out the identification information. In doing so, they discovered an outstanding New Jersey warrant that indicated New Jersey did not request other jurisdictions to arrest Byrd for extradition. The officers determined James Carter was an alias, and also discovered Byrd's criminal history included drug,

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right-hand lanes when available for traffic except when any of the following conditions exist:

(i) When overtaking and passing another vehicle proceeding in the same direction.

(ii) When traveling at a speed greater than the traffic flow.

75 Pa. Cons. Stat. § 3313(d)(1)(i)-(ii).

weapon, and assault charges. The officers requested their dispatching center to contact New Jersey officials to confirm New Jersey did not wish Pennsylvania to arrest Byrd for extradition. When attempting to clarify Byrd's identity, aliases, and criminal history, the officers experienced connection difficulties with their computer.

The officers then returned to Byrd's vehicle, asked him to exit the car, and asked him about the warrant and his alias. They also asked if he had anything illegal in the car. Byrd appeared nervous and said he had a "blunt" in the vehicle. The officers then asked Byrd for permission to search the vehicle, but stated they did not need his consent because he was not listed on the rental agreement. The officers assert that Byrd gave his consent. They subsequently found heroin and body armor in the trunk of the car and arrested Byrd.

In the District Court, Byrd moved to suppress the evidence resulting from the stop and the search, challenging the initial stop, the extension of the stop, and the search. Evidence submitted at a hearing included a dash-cam video and audio recording that began while the first officer was following Byrd's car. The video included thirty seconds prior to the officer's activation of his lights and extended through the entire stop. Audio captured discussions between the two officers attempting to identify Byrd, determining whether to act upon the New Jersey warrant, and determining whether a search could be justified. The video and audio, together, illustrate the timing of the various tasks involved with the stop. For example, Byrd stopped his car at the second location as per the

officer's request approximately nine minutes into the video. And, the officers returned to Byrd's car and asked him to exit the car approximately thirty-nine minutes into the video. At the hearing, the first officer testified it was standard practice to check with out-of-state officials to confirm whether they want the Pennsylvania officers to make an arrest even if a warrant indicates no out-of-state arrest is requested.

The District Court determined that Byrd, as the sole occupant of a rented car, had no expectation of privacy because he was not listed on the rental agreement. The District Court also found the first officer credible and accepted the officer's characterization of Byrd's passing maneuver as sufficient to justify the initial stop. Finally, the District Court held the officers developed additional reasonable suspicion of other criminal activity during the stop and all of the officers' inquiries were related to the initial stop or the newly developed suspicion.

II.

We review de novo the legal question of whether a search or seizure is reasonable under the Fourth Amendment. *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006). We review for clear error the District Court's underlying factual determinations. *Id.* at 395.

The Fourth Amendment permits a traffic stop based on reasonable suspicion that a traffic violation has occurred regardless of the officer's subjective motivations for making the stop. *Id.* at 397 ("[T]he ... reasonable suspicion standard applies to

routine traffic stops."); *United States v. Mosley*, 454 F.3d 249, 252 (3d Cir. 2006) ("[T]he Supreme Court established a bright-line rule that any technical violation of a traffic code legitimizes a stop, even if the stop is merely pretext for an investigation of some other crime."). Byrd argues it was clear error for the District Court to accept the officer's testimony that Byrd violated the left-lane statute. To support his argument, Byrd characterizes the dash-cam video as disproving the officer's assertion that Byrd had sufficient time and room to return to the right lane after passing the first truck and before passing the second truck. Byrd also attacks the officer's interpretation of the Pennsylvania statute, arguing that forcing drivers to repeatedly change lanes will lead to "highway chaos."

We reject Byrd's argument. The video shows Byrd in the left lane approaching and passing the second truck, but it does not show how long Byrd was in that lane or how much distance or space existed between trucks. Because the video does not disprove the officer's assertion, we find no basis to disturb the District Court's factual determination. Further, we reject Byrd's policy-based statutory-interpretation argument. The officer was required to possess reasonable suspicion of a traffic violation, not an understanding of the law akin to that of a seasoned jurist. *See Delfin-Colina*, 464 F.3d at 399. And, although the traffic violation at issue seemingly was minor, a stop based on the perceived violation passes constitutional muster.

Regarding the duration of the stop, officers conducting a traffic stop must act with reasonable

diligence in carrying out permissible tasks related to the purpose for the stop. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("it [is] appropriate to examine whether the police diligently pursued [the] investigation" (alterations in original) (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985))). Confirming the identity of the driver of a rental vehicle, sorting out aliases, and asking a driver to move to a more safe location are all permissible tasks. *See, e.g., id.* at 1615 ("[A]n officer's mission includes ordinary inquiries incident to [the traffic] stop .... [S]uch inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (citation omitted)). An officer does not lack diligence merely because these tasks are slightly delayed by computer issues or because a driver's use of an alias and lack of photo identification complicate the identification process. Here, the several explanations set forth by the District Court are well supported and demonstrate that the officers acted with reasonable diligence in conducting the stop.

Further, "[o]nce a valid traffic stop is initiated, 'an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation.'" *United States v. Lewis*, 672 F.3d 232, 237 (3d Cir. 2012) (quoting *United States v. Givan*, 320 F.3d 452, 458 (3d Cir. 2003)). The first officer's observation of Byrd's nervous avoidance of the center console coupled with Byrd's non-photographic identification, his use of an alias, and the absence of

his name on the rental agreement gave rise to additional suspicion of other criminal activity. Moreover, we have little trouble concluding that, upon discovering a valid outstanding warrant from another state, an officer may extend a stop to inquire as to whether that other state wants the driver arrested for extradition. *Cf. Utah v. Strieff*, 136 S. Ct. 2056, 2061-62 (2016) (noting that the discovery of a valid, outstanding warrant is an intervening development that breaks the causal chain between an illegal stop and the subsequent discovery of incriminating evidence). While the duration of the stop in this case may have been long, it was not constitutionally unreasonable.

Finally, Byrd argues he did not consent to the vehicle search. A circuit split exists as to whether the sole occupant of a rental vehicle has a Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement. *See United States v. Kennedy*, 638 F.3d 159, 165-67 (3d Cir. 2011) (collecting cases). The Third Circuit has spoken as to this issue, however, and determined such a person has no expectation of privacy and therefore no standing to challenge a search of the vehicle. *See id.* at 167-68 ("We therefore hold that society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company."). As such, we need not address Byrd's arguments concerning his lack of consent for the search.

We will affirm the judgment of the District Court.

APPENDIX B

FILED 08/26/15

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs. NO. 1:14-CR-321

TERRENCE BYRD,

Defendant.

MEMORANDUM

I. Introduction

We are considering a motion to suppress filed by Defendant Terrence Byrd. (Doc. 28). Byrd was indicted on December 17, 2014, for distribution and possession with intent to distribute heroin, and possession of body armor. (Doc. 1). In his motion, Byrd challenges the validity of an automobile search and asks that we suppress the fruits of said search. For the following reasons, we will deny the motion.

II. Background

On September 17, 2014, at approximately 2:30 p.m.,[1] Terrence Byrd's girlfriend,[2] Latasha Reed, rented a grey Ford Fusion from the Avis Budget car rental facility in Wayne, NJ. (Govt's Ex. 1). Per the rental company's policy, all additional drivers must be identified in the contract and must present their license for verification. (Doc. 47 at 4-5). Reed paid for the rental and was the only individual who signed the rental agreement. (*Id.*). Nevertheless, Byrd began driving the car immediately upon leaving the rental facility. (Doc. 43 at 112).

Later that day, around 6:00 p.m., Pennsylvania State Police Trooper David Long was monitoring traffic along Interstate 81 in Harrisburg when he noticed a grey rental vehicle being driven suspiciously. (Doc. 43 at 10). Byrd, the operator of the vehicle, was driving with his hands in the 10:00 and 2:00 position, and his seat was reclined so that he was not clearly visible through the driver's side window.[3] (*Id.* at 11). Although these are not violations of the Motor Vehicle Code, Trooper Long's suspicion was aroused, so he pulled out from his stationary location

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[1] The exact time of the car rental is disputed. The timestamp on the rental contract is 10:26 a.m., but Byrd testified that the vehicle was not picked up until the afternoon.

[2] The exact nature of Byrd and Reed's relationship is also disputed. The parties agree that Reed is the mother of "most" of Byrd's children. (Doc. 43 at 110; Doc. 51 at 4). At one point, Byrd referred to her as a "friend." (Doc. 43 at 16), but later claimed that they were engaged. (Doc. 43 at 110).

[3] The trooper referred to this as driving behind "the B pillar." (Doc. 43 at 10).

and began to follow the vehicle. (*Id.* at 12). After witnessing Byrd drive in the left lane for some time without overtaking any vehicles in the right lane (a so-called "left lane violation"),[4] Trooper Long initiated a traffic stop. (*Id.* at 12-13). When Long approached the vehicle, he noticed that Byrd was the only occupant and that he was extremely nervous. (*Id.* at 15). Long asked to see a copy of the rental agreement and Byrd's driver's license. Byrd explained that he did not have his license because he had washed it, and provided an interim license that did not have a photo identification. (Doc. 43 at 16). After searching for a short time, Byrd also produced the rental agreement, and explained that his "friend" had rented the vehicle. (*Id.*). When Long returned to his own vehicle, he noted that the sun was causing an unsafe glare on their location, so he asked Byrd to move the traffic stop to a different location. (*Id.* at 18). Once in the new location, Long ran Byrd's name, date of birth, and license number through his computer, but received results for an individual named James Carter. (*Id.* at 18). At this time, Long's partner, Trooper Martin, arrived and the two of them began to sort out Byrd's identity. They discovered that Byrd was wanted on an active warrant in New Jersey for a parole violation. (*Id.* at 20). The troopers placed a call to determine whether New Jersey would extradite for the parole violation. (*Id.*). They also checked Byrd's criminal history, which revealed prior charges for weapons and drug violations, and assault. (Doc. 43 at 21). After approximately 35 minutes, the troopers confirmed that "James Carter" was an alias, that Terrence Byrd

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[4] This is a violation of 75 Pa C.S § 3313(d)(1).

was the defendant's true name, and that New Jersey would not extradite for the warrant. (*Id.* at 22).

The troopers returned to Byrd and asked him to step out of the car. (Doc. 43 at 22). By this time, Byrd was extremely nervous, "not able to stand still[,] ... [and was] dancing back and forth, pacing back and forth ...." (*Id.* at 23). The troopers asked Byrd about the warrant and the alias, and explained the reason for the delay. They also asked if there was anything illegal in the car, and asked to see Byrd's tongue. (*Id.*). Byrd showed the troopers his tongue and stated that he had smoked a "blunt"[5] in the vehicle. (Doc. 34-9 at 8). The troopers asked for permission to search the car, but told Byrd that because the car was a rental and Byrd's name was not on the agreement they did not need his permission to search. (Doc. 43 at 82). At first, Byrd offered to get the blunt himself, which the troopers refused. Eventually, Byrd consented to the search. (*Id.* at 24). While Long was searching the car, Byrd admitted to Martin that he had recently used cocaine. Shortly thereafter, Trooper Swope, an off-duty Pennsylvania State Trooper, stopped to see if Long and Martin needed back-up. When the troopers opened the car's trunk they found a bulletproof vest. (*Id.* at 25). Martin then told Byrd that he was going to detain him, at which point Byrd began to run. Trooper Swope took Byrd

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[5] Defendant claims for the first time in his brief that the "blunt" he was referring to was a "Philly Blunt cigar" and that the troopers misunderstood him to mean that he had smoked a marijuana cigarette. (Doc. 54 at 23). However, neither the troopers nor Defendant testified to this fact at the suppression hearing.

into custody after a short chase. Byrd then admitted that there was heroin in the car. (*Id.* at 26).

III. Discussion

A. Standing to Contest the Search

The Third Circuit has clearly instructed that, generally, unauthorized drivers of rental vehicles lack standing to challenge a search thereof. *See United States v. Kennedy*, 638 F.3d 159, 165 (3d Cir. 2011) ("[A]s a general rule, the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy."). This general rule can be overcome by "extraordinary circumstances," such as where the unauthorized driver is "also the husband of the woman who had rented the car four days earlier and had ... 'personally contacted the rental car company ... and reserved the vehicle in his name, using his own credit card, which was billed for the rental.'" *Id.* at 167 (quoting *United States v. Smith*, 263 F.3d 571 (6th Cir. 2001)). In *Kennedy*, the Third Circuit explained, none of these additional factors were present; the defendant was simply granted permission to use the car by the renter, and therefore, he had no expectation of privacy in the car. *Id.* at 168. The instant situation is identical to that presented in *Kennedy*. Byrd was merely given permission by Reed to drive the car–he was not a party to the rental agreement and he did not pay for the rental. Byrd's assertions that he "had an

expectation of privacy ... [because] [a]ny other finding[ ] ignores the real world reality that people of limited means cannot afford to add the extra driver to the contract ..." and that "[a]n expectation of privacy should not be dependent on a defendant's pocket book ...[,]" are both unavailing and inaccurate under established Fourth Amendment jurisprudence. Because Byrd had no expectation of privacy in the vehicle, and thus no standing to challenge the search, his motion will be denied.

B. The Traffic Stop

Even if we could find that extraordinary circumstances exist to bestow an expectation of privacy upon Byrd, we nevertheless find that the traffic stop and ensuing search were lawful. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches are *per se* unreasonable unless an exception to the warrant requirement applies. *Horton v. California*, 496 U.S. 128, 133 (1990). One such exception is the *Terry* stop. Under *Terry*, an officer may conduct "a brief investigatory stop when he or she has a reasonable articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "'[I]n a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a particular vehicular violation.'" *United States v. Kennedy*, No. 13-240, 2014 U.S. Dist. LEXIS 159802, at *24 (3d Cir. Nov. 13, 2014) (quoting *Arizona v.*

Johnson, 555 U.S. 323, 327 (2009)). If a police officer observes an individual commit a traffic violation, he or she is permitted to stop that vehicle. *See United States v. Bonner*, 363 F.3d 213, 216 (3d Cir. 2004) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1997) ("A police officer who observed a violation of state traffic laws may lawfully stop the car committing the violation.")).

Byrd argues that Trooper Long stopped him because he was driving with his seat reclined and his hands in the 10:00 and 2:00 positions on the wheel. (Doc. 29 at 3). Byrd contends that because neither of these things constitute a traffic violation, the stop and resulting search was illegal. However, Long testified during the preliminary hearing, and again at the suppression hearing, that he stopped Byrd because he was driving in the left lane without overtaking any vehicles in the right lane, a violation of 75 Pa. C.S. § 3313(d). (Doc. 43 at 1[illegible] Because Long personally witnessed the violation, he had cause to initiate the traffic stop. Accordingly, the stop itself was lawful.[6]

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[6] The majority of Defendant's 30-page supplemental brief (Doc. 54)—which the court authorized so that the parties could address the issue of standing—was dedicated to Defendant's claim that he should not have been stopped for the left lane violation in the first place. Defendant insists that he was not impeding traffic and that the video from the trooper's dash camera clearly demonstrates this fact. However, Trooper Long testified repeatedly at the suppression hearing that the violation that formed the basis of the stop was not captured on the video. (Doc. 43 at 42, 44-45). We will credit the trooper's testimony.

C. The Search

"Upon making a lawful traffic stop of a vehicle, police officers are granted the authority 'to detain the automobile and its occupants pending an inquiry into a vehicular violation.'" *Kennedy*, *supra* at *26 (quoting *Johnson*, 555 U.S. at 327). In particular, officers have the discretion to: "(1) order the driver and passengers to get out of the vehicle; or (2) remain in the vehicle while the officers investigate the violation." *Bonner*, 363 F.3d at 216. "Once a valid traffic stop is initiated, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of the inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation." *United States v. Lewis*, 672 F.3d 232, 237 (3d Cir. 2012).

To determine whether the post-stop search is lawful, we employ a two-part analysis. First, we examine whether the officer was "aware of specific and articulable facts which gave rise to reasonable suspicion under the totality of the circumstances[.]" *Kennedy*, *supra* at *28 (citing *United States v. Davis*, 430 F.3d 345, 353 (6th Cir. 2005)). Reasonable suspicion "can be established with information that is different in quantity or content than that required for probable cause." *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006). According to the Third Circuit:

> Reasonable suspicion, while not rigidly defined, may be the result of the following factors: "specialized

> knowledge and investigative inferences," "personal observation of suspicious behavior," information from sources that prove to be reliable, and information from sources that—while unknown to the police—prove by the accuracy and intimacy of the information provided to be reliable at least as to the details contained within that tip.

United States v. Brown, 448 F.3d 239, 247 (3d Cir. 2006). In particular, "the Court must defer to the 'officer's knowledge of the nature and nuances of the type of criminal activity the officer has observed.'" *Kennedy*, *supra* at *29 (quoting *United States v. Robertson*, 305 F.3d 164, 166 (3d Cir. 2002)).

Second, we determine whether "the degree of intrusion [was] reasonably related in scope to the situation at hand given [the officer's] suspicions and surrounding circumstances[.]" *Id.* at *28. To do this, we look to the totality of the circumstances surrounding the stop. *See id.* at *29-30. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez v. United States*, 135 S. Ct 1609, 1615 (2015). "An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something

other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration." *Arizona v. Johnson*, 555 U.S. 323, 325 (2009).

In this case, when Long approached Byrd's vehicle, he noted that Byrd was "visibly nervous[,]" "shaking[,]" and had a difficult time obtaining his identification. (Doc. 29-1 at 5). Byrd could not produce a government-issued photo ID, and was driving a vehicle rented in someone else's name. In addition to an active arrest warrant, Byrd had a criminal history involving drugs and weapons, and had used an alias in the past. All of these factors together constitute reasonable suspicion that Byrd was engaging in some type of criminal activity. Long's brief questions regarding whether there was anything illegal in the car—which took approximately two minutes out of the entire 50-minute encounter—did not "measurably extend" the stop. His inquiries were reasonably related in scope to the situation at hand. Accordingly, the stop and resulting search were lawful.

IV. Conclusion

For the reasons above, Defendant's motion will be denied. We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
Unites States District Judge

QUESTION PRESENTED

Whether petitioner had a reasonable expectation of privacy in a rental car when petitioner was not an authorized driver under the rental agreement.

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In the Supreme Court of the United States

No. 16-1371

TERRENCE BYRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2017 WL 541405. The opinion of the district court (Pet. App. 9a-18a) is not published in the Federal Supplement but is available at 2015 WL 5038455.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2017. The petition for a writ of certiorari was filed on May 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of body armor by a

prohibited person, in violation of 18 U.S.C. 931(a)(1). He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-8a.

1. On September 17, 2014, petitioner's girlfriend rented a Ford Fusion from an Avis Budget (Avis) car rental office in New Jersey. Pet. App. 10a. According to Avis's policy, additional drivers may drive a rental car if they are (1) the renter's spouse, (2) the renter's co-employee, or (3) another person who appears in person at the time of the rental and signs an authorized driver form. C.A. App. 73. The rental agreement expressly provides that "permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement." *Ibid.* (capitalization omitted). Petitioner's girlfriend paid for the rental car and was the only person to sign the rental agreement. Pet. App. 10a. Nevertheless, petitioner began driving the car immediately upon leaving the Avis facility. *Ibid.*

Later that evening, a police officer stopped petitioner for a traffic violation. Pet. App. 10a-11a. During the stop, the officer asked petitioner for his driver's license and the rental agreement. *Id.* at 3a. Petitioner produced an interim New York driver's license without a photo and the Avis rental agreement, which did not list him as the renter or an authorized driver. *Ibid.*

When the officer checked petitioner's identification, the computer returned a different name, James Carter. Pet. App. 3a. The officer and a second officer ultimately determined that James Carter was an alias and that petitioner had a lengthy criminal history that included drug and weapons charges. *Id.* at 3a-4a. The officers returned to the rental car and asked petitioner about his alias and whether he had anything illegal in the car.

Id. at 4a. Petitioner replied that he had a "blunt" (meaning marijuana, C.A. App. 101) in the car. Pet. App. 4a. The officers then asked for petitioner's consent to search the vehicle, though they also stated that they did not need his consent because he was not an authorized driver under the rental agreement. *Ibid.* According to the officers, petitioner consented to the search. *Ibid.* As the search began, petitioner also admitted to recently using cocaine. *Id.* at 12a.

The officers searched the car and found body armor and 49 bricks of heroin in the trunk. Pet. App. 4a; C.A. App. 58. After a failed attempt to flee on foot, petitioner was arrested. Pet. App. 12a-13a.

2. A federal grand jury in the United States District Court for the Middle District of Pennsylvania returned an indictment charging petitioner with one count of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of possession of body armor by a prohibited person, in violation of 18 U.S.C. 931(a)(1). Indictment 1-3.

Petitioner moved to suppress the evidence seized from the rental car on the ground that the search of the car had violated the Fourth Amendment. Pet. App. 9a. After conducting an evidentiary hearing, the district court denied the motion. *Id.* at 18a. It held that petitioner lacked a reasonable expectation of privacy in the rental car because, regardless of whether his girlfriend gave him permission to drive the car, "he was not a party to the rental agreement and he did not pay for the rental." *Id.* at 13a. The court also ruled that the officers complied with the Fourth Amendment in initiating the traffic stop and inquiring about petitioner's identity and potential illegal activity. *Id.* at 14a-18a.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1a-8a. Relying on circuit precedent, the court held that petitioner could not object to the search of the rental car because a driver who is not named in the rental agreement has no reasonable expectation of privacy in the rental car. *Id.* at 8a (citing *United States* v. *Kennedy*, 638 F.3d 159, 167-168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012)). Accordingly, the court did not address whether petitioner in fact consented to the search. *Ibid.*[1]

ARGUMENT

Petitioner renews his contention (Pet. 10-34) that he had a reasonable expectation of privacy in the rental car despite the fact that he was an unauthorized driver under the rental agreement. The court of appeals' decision is correct, and it does not implicate any square conflict among the courts of appeals, but instead only a relatively shallow conflict with two state courts. Moreover, this case would be a poor vehicle for resolving the question presented because, even if petitioner could properly bring a Fourth Amendment challenge to the search of the rental car, the challenge would fail. This Court has repeatedly denied review in cases presenting the question whether an unauthorized driver has a reasonable expectation of privacy in a rental car,[2] and it should do the same here.

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[1] The court of appeals also held that the traffic stop itself complied with the Fourth Amendment. Pet. App. 5a-8a. Petitioner does not challenge that holding.

[2] See *Goode* v. *United States*, 134 S. Ct. 2291 (2014) (No. 13-8577); *Kennedy* v. *United States*, 565 U.S. 1110 (2012) (No. 10-11094); *Luster* v. *United States*, 558 U.S. 1077 (2009) (No. 09-5734); *Mincey* v. *United States*, 558 U.S. 945 (2009) (No. 08-1482).

1. a. An individual's ability to "claim the protection of the Fourth Amendment depends * * * upon whether" he "has a legitimate expectation of privacy in the invaded place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978).[3] A court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure "invaded [the defendant's] legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980); see also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

To claim the protection of the Fourth Amendment, a defendant "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 144 n.12); see, *e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Although legitimate expectations of privacy "need not be based on a common-law interest in real or personal property," the Court "has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment." *Rakas*, 439 U.S. at 144 n.12. Indeed, in two recent cases, the Court has relied on property concepts to hold that the government conduct at issue constituted a search under

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[3] Although the Court has analyzed questions concerning an individual's ability to claim Fourth Amendment protections under the rubric of "standing," the Court stated in *Rakas* that "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." 439 U.S. at 140.

the Fourth Amendment. See *Florida* v. *Jardines*, 133 S. Ct. 1409, 1413-1418 (2013) (drug sniff around curtilage of home was an unlawful trespass); *United States* v. *Jones*, 565 U.S. 400, 404-405, 411-412 (2012) (installation of a GPS tracking device on a vehicle was an unlawful physical intrusion into the vehicle).

In this case, the court of appeals correctly held that petitioner did not have a legitimate expectation of privacy in the rental car because he was an unauthorized driver under the rental agreement. As the owner of the car, Avis could authorize others to drive the car. Persons authorized to use a car by its lawful owner generally acquire an expectation of privacy in the car. See, *e.g.*, *United States* v. *Miller*, 821 F.2d 546, 548-549 (11th Cir. 1987). That is because authorized users of a car have lawful possession and may legitimately expect that—within the scope of authority granted to them by the car's owner—they can exclude others from the car. See *Rakas*, 439 U.S. at 144 n.12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]."); *United States* v. *Walker*, 237 F.3d 845, 849 (7th Cir. 2001) ("A person listed as an approved driver on a rental agreement has an objective expectation of privacy in the vehicle due to his possessory and property interest in the vehicle.").

Petitioner, by contrast, did not lawfully possess the rental car because Avis did not authorize him to drive it. The consent of petitioner's girlfriend could not validly authorize petitioner to drive the car because the rental agreement did not grant her the power to let others drive the vehicle. See C.A. App. 73. In fact, the contract expressly advised that "permitting an unauthorized driver to operate the vehicle is a violation of the

rental agreement." *Ibid.* (capitalization omitted). Because petitioner's girlfriend lacked the authority to allow persons not mentioned in the rental agreement to drive the car, petitioner could not reasonably expect to be entitled to control the car and exclude others from it. As such, despite any subjective expectations on his part, petitioner had no expectation of privacy in the car that "society is prepared to recognize as 'reasonable.'" *Rakas*, 439 U.S. at 144 n.12 (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

b. Petitioner's counterarguments are mistaken. Petitioner contends (Pet. 27, 33) that a driver who has the renter's permission to drive a vehicle also has the "authority" to exclude others, but he provides no support for that contention. Here, the contract between Avis and petitioner's girlfriend gave her the authority to drive the car, but it expressly stated that the contract would be void if she allowed another person to drive the car. C.A. App. 73. Petitioner's girlfriend thus had no legal authority to allow petitioner to drive the car or to empower him to exclude others from the car. To the contrary, as an Avis representative testified, if Avis discovers that the renter of an Avis vehicle has loaned the vehicle to an unauthorized person, then the contract is void and Avis "would recover the vehicle." *Id.* at 207.

Petitioner responds (Pet. 32-34) that such reasoning places an undue emphasis on property concepts. But, as explained above (pp. 5-6, *supra*), property interests remain relevant (although not dispositive) in determining whether a defendant has a reasonable expectation of privacy entitled to protection under the Fourth Amendment. Although individuals may sometimes demonstrate a reasonable expectation of privacy without a

possessory interest (Pet. 32), they must exercise "legitimate[]" authority over the relevant premises or effects. *Rakas*, 439 U.S. at 143 n.12. The mere contention (Pet. 33-34) that petitioner's operation of the rental car was not criminal does not affirmatively establish his legitimate authority over the vehicle, particularly in light of the contract expressly stating otherwise.

Petitioner further argues (Pet. 28-29) that an unauthorized driver's expectation of privacy in a vehicle is similar to the privacy rights of subtenants who violate certain terms of their rental agreements (such as prohibitions on pets), or hotel guests who overstay their visits. But the analogy is inapt because individuals have a lesser expectation of privacy in vehicles than in homes. See *Rakas*, 439 U.S. at 148; *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Thus, even if a tenant or guest retains some expectation of privacy in a residence or hotel room, despite having violated a specific contractual term, it does not follow that an unauthorized driver of a rental car has an equivalent expectation of privacy in that rental car. In addition, the risk of damage to property or to third parties from an unauthorized driver of a rental car is far more significant than the minor real-property violations petitioner hypothesizes. Rental car companies require information about the identities of all drivers in order to reduce the risk of damage to the vehicle or to third parties by persons without a valid driver's license, young or unskilled drivers, and drivers with poor driving habits or records. Under those circumstances, society does not recognize as reasonable and legitimate a practice by which the driver of a rental car colludes with another person to conceal from the rental company the identity of an unauthorized driver.

See *United States* v. *Kennedy*, 638 F.3d 159, 167-168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012).

2. a. Contrary to petitioner's contention (Pet. 12-18), no square conflict exists among the courts of appeals. The decision below is consistent with decisions from the Fourth, Fifth, and Tenth Circuits, all of which have concluded that an unauthorized driver of a rental car lacks a legitimate expectation of privacy in the car, even when the renter purports to give him permission to drive it. See, *e.g.*, *United States* v. *Wellons*, 32 F.3d 117, 119 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); *United States* v. *Seeley*, 331 F.3d 471, 472 & n.1 (5th Cir. 2003) (per curiam); *United States* v. *Boruff*, 909 F.2d 111, 117 (5th Cir. 1990), cert. denied, 499 U.S. 975 (1991); *United States* v. *Roper*, 918 F.2d 885, 886-888 (10th Cir. 1990); *United States* v. *Obregon*, 748 F.2d 1371, 1374-1375 (10th Cir. 1984). The Arkansas and Montana Supreme Courts have taken the same view. See *Wilson* v. *State*, 2014 Ark. 8, 9 (2014); *State* v. *Clark*, 198 P.3d 809, 816 (Mont. 2008). In addition, the Second Circuit has held that an unauthorized and *unlicensed* driver of a rental car may not contest a search of the rental car. *United States* v. *Lyle*, 856 F.3d 191, 201-202 (2017).

The decision below is also consistent with decisions from the First and Sixth Circuits. The Sixth Circuit, like the court of appeals in this case, applies the "general rule" that "an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle," and also recognizes that extraordinary circumstances can make an individual not specifically listed on a rental agreement "the de facto renter." *United States* v. *Smith*, 263 F.3d 571, 586-587 (2001)

(emphasis omitted); see *Kennedy*, 638 F.3d at 165 (stating "a general rule" but also noting an "extraordinary circumstances" exception). In *Smith*, the court explained that the "truly unique" facts of the case made Smith "unlike any of the drivers in any of [the other] cases": Smith "personally had a business relationship with the rental company," reserved the car in his name, and provided the credit card that paid for the rental, and, although his wife ultimately picked up the car, she did so using the reservation number given to Smith. 263 F.3d at 586. In the Sixth Circuit's view, those facts made Smith the "de facto renter." *Id.* at 587 (emphasis omitted).

The First Circuit in *United States* v. *Sanchez*, 943 F.2d 110 (1991), similarly left open the possibility that unusual facts could support a reasonable expectation of privacy by an unauthorized renter of a vehicle. But *Sanchez* refused to recognize the driver's claimed privacy interest where "at best [he] was operating the vehicle with the authority of a person who himself had been given the authority to operate the vehicle by somebody else," *id.* at 113 (citation omitted), and had failed to demonstrate "a more intimate relationship with the car's owner or a history of regular use of the [car]—from which a presumption of permission [from the owner] could be drawn," *id.* at 114. Petitioner does not contend that his case involves any unusual facts that might lead either the First or Sixth Circuit to conclude that he had a legitimate privacy interest in the rental car.[4]

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[4] *United States* v. *Cooper*, 133 F.3d 1394 (11th Cir. 1998), concerned an authorized driver who continued to drive the car after the rental contract had expired. *Id.* at 1397, 1400. Because that person had personally rented the car and was listed as the authorized driver on the contract, and because the company previously had

Petitioner contends (Pet. 12-13) that Eighth and Ninth Circuit decisions support his position, but the decisions he cites do not reflect a division of authority warranting this Court's review. In *United States* v. *Thomas*, 447 F.3d 1191 (2006), the Ninth Circuit rejected the defendant's claim that, although he was not an authorized driver under the rental agreement, he possessed a privacy interest allowing him to challenge the search of a rental car. *Id.* at 1199. The court held that Thomas had no reasonable expectation of privacy in the car because he failed even "to show that he received [the renter's] permission to use the car." *Ibid.* Although the court purported to reject the view that an individual can never challenge a search of a rental car if he is not an authorized driver under the rental agreement, *id.* at 1198, the court was not presented with facts that required it to determine whether such a challenge should be permitted. See *id.* at 1199 ("An unauthorized driver *may* have standing to challenge a search if he or she has received permission to use the car.") (emphasis added). And in the 11 years since it decided *Thomas*, the Ninth Circuit has not incorporated those statements into a holding permitting an unauthorized driver to challenge the search of a rental car.[5]

Petitioner's reliance (Pet. 12) on the Eighth Circuit fares no better. In *United States* v. *Muhammad*, 58 F.3d

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been lenient with respect to overdue rentals, *ibid.*, the court of appeals concluded that he was in a "materially different" position than an unauthorized driver. *Id.* at 1400.

[5] Petitioner also cites (Pet. 13) *Lyall* v. *City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), but that case concerned a Fourth Amendment claim by event organizers who had received permission to use a warehouse from the person leasing the space, see *id.* at 1181-1182, not a claim by an unauthorized driver of a rental car.

353 (1995), the defendant "presented absolutely no evidence that he had been granted permission to drive the car." *Id.* at 355. The court of appeals thus rejected his claim of a legitimate expectation of privacy. *Ibid.* The court noted that the parties agreed that "the defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy," *ibid.*, but in the absence of any such evidence, the court had no occasion to announce any holding on the showing that would support such an expectation. Later, in *United States* v. *Best*, 135 F.3d 1223 (1998), the Eighth Circuit remanded a case in which the "district court [had] not rule[d] on the standing issue," citing *Muhammad* in dicta stating that "[i]f Thomas [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing." *Id.* at 1225. That remand does not definitively resolve the nature of the relationship required to establish such a privacy interest.

In view of the courts' rejection of the defendants' claims in *Muhammad* and *Thomas*, and the remand in *Best*, neither the Eighth Circuit nor the Ninth Circuit can be said to have resolved the issue in this case in a defendant's favor. Those decisions therefore do not reflect a square conflict on the question presented that would warrant this Court's review.

b. Petitioner also contends that four state courts have held that an unauthorized driver of a rental car has standing to challenge a search of that car if he had permission from an authorized driver to drive the car. Pet. 13-14 (citing *State* v. *Nelson*, 807 N.W.2d 769, 778-779 (Neb. 2011); *State* v. *Van Dang*, 120 P.3d 830, 834-835 (N.M. 2005); *State* v. *Bass*, 300 P.3d 1193, 1196 (Okla.

Crim. App. 2013); *Parker* v. *State*, 182 S.W.3d 923, 925-927 (Tex. Crim. App. 2006)). Petitioner's reliance on *Van Dang* and *Parker* is misplaced.

Neither *Van Dang* nor *Parker* establishes that the courts in the relevant states would reach a result different from the result below on the facts of this case. In *Van Dang*, the New Mexico Supreme Court remarked that the unlisted driver of a rental car can have standing if he presents evidence that he had the listed driver's permission to drive the car, but its actual holding was that the defendant lacked standing because he did not show that he had such permission. See 120 P.3d at 834-835. And in *Parker*, the Texas Court of Criminal Appeals held that courts should "consider[] the circumstances surrounding the use of the vehicle," 182 S.W.3d at 927, which will necessarily differ from case to case. In describing the relevant circumstances that supported standing in that case, the court noted that "nothing in the record * * * indicates that [the defendant] knew about the terms of the car rental agreement or that he knew the agreement did not list him as an authorized driver." *Ibid.* In this case, by contrast, petitioner admitted that he took possession of the rental agreement, C.A. App. 190, which clearly did not list his name, *id.* at 193.

Particularly in the absence of a clear divide among the federal courts of appeals, the relatively shallow division of authorities indicated by the other two state-court decisions does not warrant this Court's review.

3. In any event, this would not be a suitable vehicle for addressing the question presented, because even if petitioner could challenge the search in this case, his challenge would fail.

a. First, petitioner's Fourth Amendment claim would fail because he consented to the search of the rental car. See *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). The district court, in its recitation of the facts, specifically noted that petitioner "consented to the search," Pet. App. 12a, and the record fully supports that determination. At the suppression hearing, the officer who searched the car testified that petitioner gave his express consent. C.A. App. 102. A video recording of the stop appeared consistent with the officer's testimony. See Gov't C.A. Br. 41 n.11. And petitioner did not testify at the hearing about whether he gave the officers consent. See C.A. App. 187-191. Although the court of appeals declined to address this alternative ground for denying petitioner's motion to suppress, Pet. App. 8a, it would provide a strong basis for upholding the search on remand.

b. Second, even if petitioner had standing to object to the search and even if he had not validly consented, there was probable cause to search the car without a warrant. Police officers may search a vehicle without a warrant so long as they have probable cause that would support a warrant. See *United States* v. *Ross*, 456 U.S. 798, 829-830 (1982). Here, petitioner's admission that he had a "blunt"—meaning marijuana, see C.A. App. 101; see also Pet. 6-7—somewhere in the car alone established "probable cause to believe that contraband [wa]s concealed somewhere within" the vehicle. *Ross*, 456 U.S. at 800. Further, the police also knew that petitioner was subject to an outstanding warrant; he had a lengthy record of drug and weapons charges; he behaved nervously during the stop; and he admitted to recently using cocaine. Pet. App. 3a-4a, 11a-12a; C.A. App. 57-58. That information strengthened the officers' cause to believe

that the car (including the trunk) contained drugs. Although the district court's standing decision pretermitted any discussion of probable cause, see Pet. 26 n.11, the officers' clear probable cause to search the car would provide yet another justification for the search, in the event of a remand. For that reason as well, further review is unwarranted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

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TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

The government does not dispute that a huge number of drivers are affected by the answer to the question whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. Nor does it dispute that the question recurs frequently. The question has divided the courts of appeals and cries out for this Court's immediate review. The government's attempts to show otherwise are meritless.

The government acknowledges a split but argues that some of the conflicting decisions are merely dicta. The government is wrong—the relevant statements are necessary to the outcomes of each of the decisions cited in the petition. That is why seven federal Circuits agree with our assessment of the split's depth. *Infra* 3 n.1.

The government then erroneously suggests that this case is not a clean vehicle for resolving the split, arguing the search here was justified by Mr. Byrd's consent or by probable cause. The legal arguments are wrong, but more importantly, the decision below addressed neither issue. So as presented to this Court, this case turns exclusively on the question presented. There is no vehicle problem.

Finally, the government errs in defending the Third Circuit's rule that, save for "extraordinary circumstances," an unlisted driver cannot have a reasonable expectation of privacy in a rental car. That rule means the police may conduct a search whenever they

encounter an unlisted driver of a rental car, whether or not the police have a warrant or probable cause or, indeed, any suspicion at all. That breathtakingly capacious vision of police authority would give "officers unbridled discretion to rummage at will among a person's private effects," *Arizona v. Gant*, 556 U.S. 332, 345 (2009), in derogation of basic Fourth Amendment principles. The government's position also contravenes this Court's cases by focusing the Fourth Amendment inquiry on the terms of individual car-rental contracts rather than on "widely shared social expectations" of privacy. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). The petition should be granted.

I. The Government Acknowledges A Split Of Authority And Fails To Minimize Its Depth.

The government does not dispute that the Third Circuit's decision below, along with decisions of the Fourth, Fifth, and Tenth Circuits and the high courts of Montana and Arkansas, directly conflicts with the decisions of the high courts of Oklahoma and Nebraska. BIO 4. Nor does the government dispute that the Sixth Circuit follows a third approach that produces different outcomes. BIO 9-10. Those concessions alone acknowledge the circuit split and the intra-jurisdictional conflict in Oklahoma, where unlisted drivers have standing to challenge the search of a rental car in state court but not in federal court. *Compare State v. Bass*, 300 P.3d 1193, 1196 (Okla. Crim. App. 2013) *with United States v. Worthon*, 520 F.3d 1173, 1183 (10th Cir. 2008).

The government instead goes straight for the capillaries, contending that the 6-2-1 split it acknowledges is "relatively shallow." BIO 4. The government argues in particular that certain statements in the decisions of the Eighth and Ninth Circuits and the New Mexico Supreme Court were not "required" for the outcomes of those cases. BIO 11. The government badly mischaracterizes those decisions. Indeed, seven Circuits have recognized a deep split.[1] Correctly counted, the split is 6-6-1.

In *United States v. Best*, 135 F.3d 1223 (8th Cir. 1998), the record was unclear whether the renter had given the defendant permission to drive the rental car. The Eighth Circuit concluded that the defendant "would have a privacy interest giving rise to standing" if the renter "had granted [the defendant] permission to use the rental automobile." *Id.* at 1225. That language was necessary to the outcome and was therefore not "dicta," BIO 12, because it was the court's *only* basis for vacating the district court's denial of the

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[1] *See* Pet. App. 8a ("A circuit split exists."); *United States v. Lyle*, 856 F.3d 191, 200 (2d Cir. 2017) ("This question has divided ... circuit courts."); *United States v. Kennedy*, 638 F.3d 159, 165-66 (3d Cir. 2011) (canvassing the split); *United States v. Houston*, No. 16-4340, 2017 WL 1957474, *2 n.2 (4th Cir. May 11, 2017) ("[Our rule] ... conflict[s] with ... decisions ... of our sister circuits"); *United States v. Smith*, 263 F.3d 571, 583-86 (6th Cir. 2001) (canvassing the split); *United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) (noting "the existence of a circuit split"); *United States v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006) (canvassing the split); *United States v. Gayle*, 608 F. Appx. 783, 788 (11th Cir. 2015) ("The circuits ... are split.").

suppression motion and remanding for further findings.

Similarly, in *Thomas*, 447 F.3d 1191, the Ninth Circuit "reject[ed] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." *Id.* at 1198. The court instead concluded that "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge [a] search." *Id.* at 1199. The court then affirmed the denial of suppression on the ground that the defendant had "failed to show that he received [the renter's] permission to use the car." *Id.* Were it not for the conclusion that an unlisted driver has standing to challenge a search if he has the renter's permission to drive the vehicle, the court's opinion would contain no reasoned basis for affirming the denial of suppression. That conclusion was necessary to the decision and was therefore not dicta. The Ninth Circuit itself views that conclusion as *Thomas*'s "holding," *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1189 (9th Cir. 2015), as do the district courts in the Ninth Circuit, *see United States v. Pinex*, 129 F. Supp. 3d 982, 990 (D. Mont. 2015); *United States v. King*, 560 F. Supp. 2d 906, 914 (N.D. Cal. 2008).

Likewise, in *State v. Van Dang*, 120 P.3d 830 (N.M. 2005), the New Mexico Supreme Court held that an unlisted driver must "present evidence of consent ... from the ... renter ... in order to establish standing to challenge a search of the vehicle." *Id.* at 834. As in *Thomas*, the New Mexico Supreme Court affirmed the denial of suppression on the ground that

the defendant had not established the renter's consent. *Id.* The statement quoted above is therefore a holding because, without it, the opinion would contain no reasoned basis for the court's decision.

Finally, the government argues (BIO 13) that *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006), is distinguishable because the defendant there was unaware that "the agreement did not list him as an authorized driver," *id.* at 927, whereas, here, Byrd had possession of the rental agreement. That purported "distinction" does not diminish the split's depth. Indeed, the government does not dispute that, in Texas, "society ... recognize[s] as reasonable [a defendant's] expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement." *Id.* That holding, like the holdings of the Eighth and Ninth Circuits and the high courts of New Mexico, Oklahoma, and Nebraska, directly contradicts decisions of the Third, Fourth, Fifth, and Tenth Circuits and the high courts of Montana and Arkansas.

This case involves a deep and established split, as the courts themselves have recognized. It pits the federal Circuits against one another and creates internally inconsistent Fourth Amendment law in five states. Pet. 20-21. As the government notes, over the past several years, this Court has denied certiorari in cases purporting to present the same question. BIO 4 n.2. Our petition explained, however, that each previous case has been hampered by insuperable vehicle problems not present here: that the rental company

had consented to the search or seizure or that the defendant had failed to establish that he had the renter's permission to drive the vehicle. Pet. 25-26. Thus, despite the frequency with which this issue arises, *see* Pet. 22-23 nn.7-10 (citing 35 cases raising the issue in addition to those counted in the split), this case presents the first viable opportunity this Court has had to resolve this divisive and ever-deepening conflict. This is the opportunity the Court has been waiting for, and it should take it.

II. This Case Is An Ideal Vehicle For Resolving The Split.

The government asserts that this case is not a good vehicle because the government may prevail *on remand* on other grounds—that the search was justified by Mr. Byrd's consent and by probable cause. Neither blocks this Court's review—and the government does not say otherwise—because the decision below did not address either issue.[2] In fact, the government did not even assert its probable-cause argument below. If this Court answers the question presented in the affirmative, it should reverse and remand to the Third Circuit for consideration of the issues that court did not reach. And if it answers the question in the negative, the judgment should be affirmed. In either event, the question presented will be dispositive.

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[2] This case is therefore unlike *United States v. Goode*, 550 F. Appx. 84, 84 (3d Cir. 2013), where the district court found, and the Third Circuit agreed, that the defendant had consented to the search and that the police had probable cause to search the vehicle.

The possibility that a respondent might prevail on remand has never been a basis for denying certiorari. And in this case, it is also wrong. The record does not show that the troopers obtained Mr. Byrd's valid consent. Trooper Long's brief and equivocal testimony is the only evidence bearing on the government's assertion that Mr. Byrd purportedly consented to the search. True, Long claimed on direct examination that Byrd said, "yeah, you can search the vehicle." C.A. App. 102. But on recross examination, Long clarified that what Byrd *actually* said was, "I'll get [the 'blunt'] for you," and did not otherwise "consent." C.A. App. 174.

Even assuming that Mr. Byrd signaled acquiescence in the search, it is far from clear that any statement he may have made constituted valid consent. Consent to a search is valid only if "freely and voluntarily given," *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), which requires more than "mere submission to a claim of lawful authority," *Florida v. Royer*, 460 U.S. 491, 497 (1983). The government must show that Mr. Byrd's consent was voluntary under the totality of the circumstances, and "one factor to be taken into account" is his "knowledge of the right to refuse consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). According to Trooper Long, Byrd said nothing indicating his supposed approval of the search until Long told him that the troopers did not require his consent. C.A. App. 159-60. On this record, it is hardly a foregone conclusion that the Third Circuit will rule on remand that Mr. Byrd voluntarily consented to the search of the car and its trunk. There is certainly nothing in the Third Circuit's decision suggesting that it would reach that conclusion.

The government's probable-cause argument is equally meritless. The government waived the argument by failing to make it in either court below. And that failure is unsurprising since there is no evidence supporting probable cause to search the car's trunk. Police officers may search a vehicle without a warrant if "there is probable cause to believe a vehicle contains evidence of criminal activity," but they may only search "area[s] of the vehicle in which" they have probable cause to believe "the evidence might be found." *Gant*, 556 U.S. at 347. That is why "[p]robable cause to believe ... the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab," *United States v. Ross*, 456 U.S. 798, 824 (1982), and it is why "probable cause to believe that [a] paper bag in the ... trunk contain[s] marijuana .... d[oes] not [establish] probable cause to believe that contraband was hidden in any other part of the automobile," *California v. Acevedo*, 500 U.S. 565, 580 (1991). Here, Trooper Long claimed that Mr. Byrd had said he had "smoked marijuana" in the car. C.A. App. 168; *see also* C.A. App. 161 (Trooper Long testifying that Byrd said "there was a blunt in the car").[3] Even assuming *arguendo* that the district court had credited that testimony and even assuming that such a remark would have given the troopers probable cause to search the car's *passenger compartment*, the troopers still did not have probable cause to search the car's *trunk*.

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[3] In fact, the troopers found no marijuana in the car. Pet. App. 4a.

III. The Third Circuit's Rule Authorizes Unbridled Rummaging And Ignores Everyday Expectations Of Privacy.

An unlisted driver in the Third Circuit cannot have a reasonable expectation of privacy in a rental car, except in "extraordinary circumstances" not applicable here. Pet. App. 13a. Thus, officers in the Third Circuit may search a rental vehicle whenever the driver is not listed on the rental agreement, whether or not they have a warrant or probable cause—or, indeed, any suspicion of a crime whatsoever.

This fact pattern is not an infrequent occurrence. In 2015 alone, over 115 million separate car-rental transactions occurred in the United States. Pet. 19. And as amicus explains, it is commonplace for unlisted drivers to get behind the wheel of these vehicles. Brief of National Association for Public Defense as Amicus Curiae at 14-15; *see also* Pet. 30-31. In light of the frequency with which this situation arises, the Third Circuit's rule is an affront to the Fourth Amendment's "central concern" that police officers not be given "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345; Pet. 27. Correcting the government's astonishingly broad assertion of discretionary authority, and the Third Circuit's acquiescence in it, provides further reason to grant the petition.

The Third Circuit arrived at its sweeping view of police authority by training its Fourth Amendment analysis on the terms of rental contracts. Pet. 15. Rental contracts, however, are adopted for reasons

wholly unrelated to social norms of privacy. Pet. 29. Those contracts are therefore not useful proxies for "widely shared social expectations" of privacy. *Randolph*, 547 U.S. at 111.

The government endorses the Third Circuit's analysis, but it too fails to provide any reason for hinging the Fourth Amendment's scope on the terms of standard-form rental contracts. Instead, the government changes the subject to why nondelegation clauses in rental contracts are reasonable. BIO 8 ("Rental car companies require information about the identities of all drivers in order to reduce the risk of damage to the vehicle or to third parties ...."). The reasonableness of terms in rental-car contracts, however, tells us nothing about the privacy expectations of rental-car drivers, just as the reasonableness of an apartment owner's prohibition on pets tells us nothing about the privacy expectations of her residential tenants.

Under the proper analysis, outlined in *Rakas*, a person has a reasonable expectation of privacy in property, including in a rental car, if he "lawfully possesses or controls" the property. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978); BIO 6 (agreeing with that analysis). The government does not dispute that Mr. Byrd had exclusive possession and control of the rental car—or that Mr. Byrd would therefore have expected that he could exclude others from rummaging through the car while it was in his possession. Instead, the government contends that Mr. Byrd's possession of the car was not "lawful[]" and that his expectation of privacy was not reasonable because

Avis's rental contract "expressly advised that 'permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement.'" BIO 6-7 (quoting C.A. App. 73). In other words, the government contends that "lawful[] possess[ion]" of a rental car requires strict compliance with the conditions that the owner places on the car's use—including conditions contained in standard-form rental contracts. That view is wrong for at least three independent reasons.

First, the government's position leads to absurd consequences. Pet. 30. Under that position, for example, many drivers would lose Fourth Amendment standing to challenge a search as soon as they "refuel[] the [rental] vehicle with the wrong kind of gas" or forget to "wear[] a seatbelt." Pet. 30 (quoting *United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014)). The government suggests no means of avoiding these incongruous results.

Second, the government's position is difficult to apply and therefore fails to give officers "a fair prospect of surviving judicial second-guessing months and years after a[] ... search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Officers in the field will often not know whether a suspect has violated conditions that the car's owner has placed on the car's use. They will not necessarily know, for example, whether the suspect has exceeded the rental contract's geographical or temporal limits or filled the car with the wrong type of fuel. But under the government's rule, the scope of the Fourth Amendment's protections depends on compliance with such conditions. Officers confronting non-owner drivers will

therefore not know whether they require a warrant or probable cause to conduct a search.

Third, the government's position contravenes *Rakas*. There, this Court explained that "wrongful" possession meant possession in violation of the criminal law, while "lawful[] possess[ion]" meant the opposite. *See* Pet. 33-34 (citing *Rakas*, 439 U.S. at 141 n.9, 143 n.12). Thus, here, Mr. Byrd had lawful possession of the rental car because the government does not contend that he committed a crime in coming into possession of it. While the renter may have breached her contract with Avis, that fact has no bearing on whether Mr. Byrd has a Fourth Amendment right not to be subject to a search in the absence of a judicial warrant or probable cause.

CONCLUSION

The Court should grant the petition.

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BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association for Public Defense (NAPD) is an association of more than 14,000 public defenders and other professionals who have sought to ensure that indigent clients secure their constitutional right to effective assistance of counsel.* NAPD members are advocates in jails, courtrooms, and communities, as well as experts in best practices and the practical, day-to-day representation of criminal defendants. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned-counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and a diversity of traditional and holistic practice models. The NAPD has a deep interest in the correct interpretation of laws and constitutional provisions affecting the rights of criminal defendants—particularly defendants who cannot afford to hire private counsel.

As a national organization, the NAPD is committed to ensuring that the Fourth Amendment is interpreted correctly and consistently throughout the United States. It agrees with petitioner that courts in state and federal jurisdictions across the country, like the Third Circuit in this case, have erred in denying individuals their constitutional right to a reasonable

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* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amicus curiae* states that counsel for petitioner and respondent received timely notice of intent to file this brief. All parties have consented in writing to the filing of this brief.

expectation of privacy merely because they are not listed as authorized drivers on rental-car agreements. Pet. 15–18, 27–34. This approach both defies widely shared social expectations and misconstrues state law. It also disproportionately affects Americans who lack the resources to own property in their own names. Certiorari should be granted.

SUMMARY OF ARGUMENT

More than two centuries after it was ratified, the Fourth Amendment continues to protect the "right of the people to be secure" from "unreasonable searches." U.S. Const. amend. IV. Modern technological advances and social developments do not render our rights "any less worthy of the protection for which the Founders fought." *Riley* v. *California*, 134 S. Ct. 2473, 2494–95 (2014). This Court plays an essential role in ensuring that the Fourth Amendment retains its vitality as an indispensable safeguard of liberty, even as Americans dramatically change the ways they organize their everyday affairs.

This case calls for the Court to play that role once again. The lower courts have sharply diverged over whether a driver of a rental car whose name is not listed on the rental agreement can have a reasonable expectation of privacy in the car—a frequently recurring issue, because police commonly treat a driver's use of a rental car as a basis for reasonable suspicion to justify a traffic stop. *See, e.g.*, *State* v. *Adan*, 886 N.W.2d 841, 847 (N.D. 2016). As a result of this split, the location where a person is driving at the time of a traffic stop could determine whether he has a Fourth Amendment right to privacy in a rental car. This Court has provided little guidance to date on the scope

of the Fourth Amendment rights of those who use property that someone else has rented. This case offers an opportunity to clear away the confusion about the Fourth Amendment's scope in a society that uses rental cars with increasing frequency.

I. The rising reliance of Americans (especially the economically disadvantaged) on car rentals supports this Court's review. The ascendance of the "sharing economy" has highlighted that more people than ever rent rather than own the key instrumentalities of life, whether out of personal preference or financial necessity. This case presents an opportunity to provide needed guidance to the deeply divided lower courts on the Fourth Amendment rights of non-owners—particularly rental-car drivers whose names have not been added to rental contracts. As the petition ably explains, this issue recurs with great frequency, and it has sharply divided state and federal courts nationwide. Pet. 19–24. The Court should not allow the Fourth Amendment rights of rental-car drivers to depend on jurisdictional happenstance, especially in light of the inherent mobility of motor vehicles. *See, e.g.*, *Whren* v. *United States*, 517 U.S. 806, 815 (1996).

II. The rule applied by the court of appeals below is wrong and systematically underprotects the privacy rights of rental-car drivers. To assert an expectation of privacy that "society is prepared to recognize as 'reasonable,'" it is not necessary to have a formal property interest in the area searched. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see* Pet. 32–34. Even if such an interest were required, it is far from obvious that the Third Circuit applied such a requirement correctly. In many jurisdictions, an unlisted rental-car driver who has the

renter's permission has a property or possessory interest in the car, along with the rights and duties accompanying that interest. And many courts routinely decline to enforce the prohibitions on unlisted drivers contained in many rental-car contracts. The court of appeals' rule is therefore unsound regardless of how one tests the reasonableness of a driver's expectation of privacy.

ARGUMENT

This case poses the question whether a rental-car driver who has the renter's, but not the owner's, permission to use the car can have a reasonable expectation of privacy in the vehicle. Pet. i. This question is plainly suitable for certiorari under this Court's traditional standards, as the petition explains, because it is the subject of an entrenched disagreement among several federal courts of appeals and state courts of last resort. *See* Sup. Ct. R. 10(a). But it also demands resolution in light of the increasing prevalence of car rentals in the United States, as well as their particular importance in poorer communities.

I. THE EVOLUTION OF OUR NATION'S RENTAL ECONOMY SUPPORTS CERTIORARI.

Car and other property rentals play an increasingly important role in our economic and social life. Although rentals are nothing new, in recent years Americans have been renting cars, housing, and other property at increasing rates and under arrangements that were not even possible just 10 or 20 years ago. Economically disadvantaged individuals in particular frequently use rentals and similar arrangements to mitigate or escape the cycle of poverty. Merits aside, this case calls for review to clarify the privacy rights

of the many millions of Americans who now rely on rented cars and other property—even if they are not formally listed as drivers or other users in the relevant rental agreements.

A. Car Rentals Play a Critical and Increasingly Prominent Role in American Life.

We are a car-dependent society. In sharp contrast to our pre-automobile ancestors, who would rarely venture more than a handful of miles beyond their homes, today more than 86 percent of U.S. workers commute by car. U.S. Census Bureau, *Who Drives to Work? Commuting by Automobile in the United States: 2013*, at 2 (2015), https://goo.gl/ND5QSy.

Just as automobiles changed the way commuters and others get where they need to go, technological and cultural developments have changed the way people access automobiles. In large part due to the rise of the modern "sharing economy," Americans increasingly "rent their cars, instead of buying them." Matt Phillips, *Why More and More Americans Are Renting Cars Instead of Buying Them*, Quartz (June 2, 2014), https://goo.gl/sDUWVP. This trend is emblematic of a broader social shift. "Instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them. Ownership is no longer the ultimate expression of consumer desire." Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. Consumer Res. 881, 881 (2012) (citation omitted). "Collaborative Consumption is not a niche trend, and it's not a reactionary blip to the 2008 global financial crisis. It's a growing movement with millions of

people participating from all corners of the world." Rachel Botsman & Roo Rogers, *What's Mine Is Yours: The Rise of Collaborative Consumption* xvi (2010).

For example, "car sharing" allows consumers to "temporarily gain access to cars," often using a mobile-phone or online application, "in return for a membership fee." Bardhi & Eckhardt, *supra*, at 881. Over the past decade or so, car sharing has led to a dramatic increase in the number of Americans using cars that they do not own. *See id.* at 886 ("car sharing is a popular alternative to car ownership and has grown systematically in the United States, where the revenue from car-sharing programs is expected to be $3.3 billion in 2016, up from $253 million in 2009").

This trend has magnified economically disadvantaged communities' preexisting reliance on rental cars. Despite the importance of automobiles to life and livelihood, many Americans simply cannot afford to purchase a car. Twenty-four percent of households in poverty do not own a vehicle, and low-income populations are twice as likely to travel in multi-occupant vehicles, through car sharing and carpooling. National Household Travel Survey, *Mobility Challenges for Households in Poverty* 2 (2014), https://goo.gl/U7PBwn. Frequently, members of low-income households rent cars or "borrow[] them from neighbors, friends, or relatives." John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. 49, 57 (2003). Indeed, empirical data show that minorities tend to rent cars at higher rates. Kevin Neels, *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 4–5 & tbl. 2 (2010).

These patterns are a critical part of the sharing economy, which consists largely of social networks that low-income individuals use to survive and eventually break the cycle of poverty. *See, e.g.*, Silvia Dominguez & Celeste Watkins, *Creating Networks for Survival and Mobility: Social Capital Among African-American and Latin-American Low-Income Mothers*, 50 Soc. Probs. 111 (2003). By pooling resources and support, individuals can leverage their networks to increase socioeconomic mobility. *Id.* at 124. "Low-income communities frequently pool resources in order to maximize them. Anchored in strong social networks and the collective mindset of low-income individuals, this practice is at the core of collective assets and casual lending with relaxed reciprocity." Edna R. Sawady & Jennifer Tescher, *Financial Decision Making Processes of Low-Income Individuals* 9 (2008), https://goo.gl/d6jJOq.

The rise of the sharing economy, together with the existing importance of rental cars to poorer Americans, has resulted in the proliferation of shared rental cars among low-income and minority households. Thus, among the Americans who increasingly rely on rental cars today are many members of our society's most disadvantaged groups.

Whether they realize it or not, people who sign agreements with traditional rental-car companies or who click "accept" on their mobile phone when presented with the terms of modern car-sharing services have bought into restrictions on who may drive the car. *See, e.g.*, Zipcar, *Rules of Vehicle Use* § 1 (Jan. 1, 2017), https://goo.gl/ftvGXC ("Non-Members are expressly prohibited from driving a Zipcar vehicle at any

time."). But "[f]ew people actually read" these provisions. Irma S. Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 Loy. L.A. L. Rev. 135, 136 (2006). As detailed below, contractual restrictions about who may operate rental cars have resulted in a conflict among the lower courts on the proper application of the Fourth Amendment.

B. The Court Should Clarify the Fourth Amendment Rights of Users of Rented Vehicles.

The dramatic social trend toward the use of rentals and the increased reliance on the sharing economy make it especially important that the Court clarify the Fourth Amendment rights of non-owners. The Court should grant certiorari to resolve a deep lower-court split over whether a rental-car driver may challenge an unlawful vehicle search when it turns out that the renter did not add the driver's name to the rental agreement. *See* Pet. 11–19.

The Court plays a critical role in clarifying how the Fourth Amendment applies to new technologies, having repeatedly enforced the Fourth Amendment in light of new technological developments. *See, e.g.*, *Kyllo* v. *United States*, 533 U.S. 27 (2001) (holding that the use of "sense-enhancing technology" to view the interior of a home invades a reasonable expectation of privacy); *City of Ontario* v. *Quon*, 560 U.S. 746 (2010) (holding that there is no reasonable expectation of privacy in text messages sent through a city department–issued pager); *United States* v. *Jones*, 565 U.S. 400 (2012) (holding that attaching a GPS tracker to the bottom of a car constitutes a search);

Riley v. *California*, 134 S. Ct. 2473 (2014) (holding that police must have a warrant before accessing cell phone data).

The Court has also ensured that its Fourth Amendment jurisprudence keeps pace with new social developments. *See, e.g.*, *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364 (2009) (holding that a middle school's strip search of a student suspected of possessing contraband violated the Fourth Amendment); *Florida* v. *Riley*, 488 U.S. 445 (1989) (holding that helicopter surveillance 400 feet above a defendant's greenhouse did not constitute a search in part because the aircraft's flight was in compliance with FAA regulations). The Court has accordingly stressed the importance of "the everyday expectations of privacy that we all share," *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990), and focused on what "society is prepared to recognize as 'reasonable,'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Despite the rise of the rental economy, the Court has provided little guidance on the Fourth Amendment rights of non-owners. To be sure, the reasoning in the Court's most relevant cases helps demonstrate that the Third Circuit's decision here is wrong. In cases involving the Fourth Amendment rights of overnight houseguests and hotel guests, for example, the Court has established that a person can have a reasonable expectation of privacy in a place even in the absence of any formal ownership interest. *See, e.g.*, *Olson*, 495 U.S. at 100 (holding that an overnight guest has a reasonable expectation of privacy without needing absolute control over the home); *Stoner* v. *California*, 376 U.S. 483, 490 (1964) (holding that a

warrantless search of a defendant's hotel room without consent was unlawful even if the hotel clerk consented). These cases only go so far, however, in clarifying whether an unlisted rental-car driver has a reasonable expectation of privacy.

As a result of the extensive lower-court split on the question presented, Pet. 11–19, a motorist's Fourth Amendment rights can vary depending on which State she happens to be driving in. For example, a resident of Colorado City, Arizona can borrow a friend's rental car without sacrificing her expectation of privacy, but only if she takes care to avoid driving over the line that splits her town between Arizona and Utah. In some jurisdictions, the applicable rule even depends on whether the driver is charged by federal or state prosecutors in the event wrongdoing is uncovered. Pet. 20–21. "[P]olice enforcement practices" may "vary from place to place and from time to time," but this Court has refused to "accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren* v. *United States*, 517 U.S. 806, 815 (1996); *accord Virginia* v. *Moore*, 553 U.S. 164, 171–72 (2008). Particularly when a case involves automobiles, which can and do move from place to place with ease, national uniformity in the interpretation of the Fourth Amendment is critical to ensuring fair treatment and upholding the rule of law.

This lack of clarity is especially problematic because, as discussed above, rental cars are critically important to underprivileged communities. As Justice Sotomayor explained last Term, a more restrictive view of the Fourth Amendment's protections has a disproportionately harmful effect on minorities and other

disadvantaged groups. *Utah* v. *Strieff*, 136 S. Ct. 2056, 2068–71 (2016) (dissenting opinion); *see also, e.g.*, Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 Hastings Const. L.Q. 297, 317 (2011) ("Residents of poor neighborhoods are more frequently subject to searches of their person in the form of overly aggressive stop and frisk tactics."). Car rentals' increasing popularity and prominent place in economically disadvantaged communities give this case added urgency, amplifying its suitability for certiorari under this Court's traditional standards.

* * *

This case would be an ideal candidate for review in any context: It squarely presents an important, recurring question of constitutional law that has divided the lower courts. Certiorari is particularly appropriate, however, in light of the important function rental cars serve in today's society.

II. The Third Circuit's Decision Misapplies the Fourth Amendment and Misconstrues Property Law.

This case is also an ideal vehicle because the Third Circuit's approach exemplifies how numerous lower courts have erroneously denied unlisted rental-car drivers the opportunity to assert their Fourth Amendment rights. First, the court of appeals' approach contravenes this Court's Fourth Amendment case law by erroneously making a boilerplate rental-car contract almost entirely dispositive of whether a driver has a reasonable expectation of privacy in the vehicle. Sec-

ond, even if this inquiry could be distilled to an analysis of the driver's formal legal rights in the vehicle, the Third Circuit's reasoning rests on a mistaken view of the common law of property. Third, courts commonly decline to enforce rental-agreement restrictions on unlisted drivers, revealing the illogic of conditioning constitutional rights on contractual provisions that often have no effect.

A. The Third Circuit's Rule Runs Afoul of Core Fourth Amendment Principles.

This Court's Fourth Amendment jurisprudence eschews bright-line rules to determine whether a person has a reasonable expectation of privacy, particularly rules that depend on the arcana of state law. But one would never know it from reading the Third Circuit's opinions on the privacy rights of unlisted rental-car drivers.

In *United States* v. *Kennedy*, 638 F.3d 159 (3d Cir. 2011)—the case that governed the outcome here—the Third Circuit held that a driver not listed on a rental agreement almost always lacks a reasonable expectation of privacy in the rental car. The court held that "as a general rule," an unlisted driver "lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy." *Id.* at 165. It reasoned that "the lack of a cognizable property interest in the rental vehicle and the accompanying right to exclude make[] it generally unreasonable for an unauthorized driver to expect privacy in the vehicle." *Id.* at 167. Indeed, the Third Circuit has never found the "extraordinary circumstances" proviso applicable. In this case and others, it has instead treated *Kennedy*'s holding as akin

to a per se rule, applying it with scant analysis of the factual circumstances. *See, e.g.*, Pet. App. 13a–14a; *United States* v. *Mebrtatu*, 543 F. App'x 137, 139 (3d Cir. 2013); *United States* v. *Norman*, 465 F. App'x 110, 116 n.9 (3d Cir. 2012). The only circumstances it has recognized as an exception are "truly unique" and extremely narrow—such as when the unlisted driver is married to the renter, "personally contacted the rental car company" to make the reservation, *and* "reserved the vehicle in his name, using his own credit card." *Kennedy*, 638 F.3d at 165, 168 (internal quotation marks omitted) (discussing *United States* v. *Smith*, 263 F.3d 571 (6th Cir. 2001)).

This is not how the Fourth Amendment is supposed to work. "[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States* v. *Drayton*, 536 U.S. 194, 201 (2002); *see also, e.g.*, *Oliver* v. *United States*, 466 U.S. 170, 177 (1984) ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant."). Although courts are inclined to provide clear guidance, they must be careful in this area not to devise rigid rules that disregard meaningful differences among cases. *See, e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 59 (1968) ("The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case."); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.").

Furthermore, a person's "capacity to claim the protection of the Fourth Amendment" does not depend on his ability to assert a formal "property right in the invaded place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). Instead, "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, *either* by reference to concepts of real or personal property law *or* to understandings that are recognized and permitted by society." *Id.* at 143 n.12 (emphases added); *see also, e.g.*, *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring) ("[E]ven in the absence of a trespass, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." (internal quotation marks omitted)). The Court has therefore recognized that people can have a reasonable expectation of privacy in areas they have no legal right to control. *See, e.g.*, *Olson*, 495 U.S. at 100 (overnight guest).

The approach of the Third Circuit (and the other courts aligned with it) is inconsistent with these principles. For one, this approach glosses over consequential differences among cases by dismissing the privacy expectations of almost any rental-car driver who lacks the rental company's permission. The Third Circuit's rule treats people who use rental cars with the renters' permission—an exceedingly common practice in society—the same way it treats those who use rental cars with no permission at all. *See* Pet. 33–34 (noting that petitioner's operation of the rental car was not wrongful in any criminal sense); *see also, e.g.*, *Commonwealth* v. *Campbell*, 59 N.E.3d 394, 402 (Mass. 2016) ("A renter's decision to allow a person who is not a permitted driver according to the rental

agreement to drive a rental vehicle may be a breach of that agreement, but it does not also result in a violation of criminal law."). In fact, the Third Circuit has relied on *Kennedy* in holding that "the possessor of a stolen vehicle lacks standing to challenge a search of the vehicle." *United States* v. *White*, 504 F. App'x 168, 171–72 (2012).

The Third Circuit also ignores how society views innocuous usage of rental cars by unlisted drivers. Numerous courts have recognized how common it is for individuals not listed on rental agreements to drive rental cars. *See, e.g.*, *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996) ("[W]hen there is a general, broad admonition not to let anyone else drive the car" or even an "express prohibition against third drivers," it is "reasonably foreseeable" that "the permittee would allow someone else to drive the car."). Many have acknowledged that the likelihood of unlisted drivers using rental cars is "exceedingly great," calling the practice "foreseeable," *Motor Vehicle Accident Indem. Corp.* v. *Cont'l Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 184 (N.Y. 1974), and a "common scenario," *Thrifty Car Rental, Inc.* v. *Crowley*, 677 N.Y.S.2d 457, 459 (Sup. Ct. Albany Cty. 1998); *see also Chandler* v. *Geico Indem. Co.*, 78 So. 3d 1293, 1299 (Fla. 2011) ("a bailee or lessee of a rented automobile, similarly as its owner, may permit another to operate it (and often does)." (internal quotation marks omitted)); *State* v. *Cutler*, 159 P.3d 909, 912 (Idaho Ct. App. 2007) (noting "the increasingly common utilization of rental vehicles for a myriad of purposes"). Use of a rental car by an unlisted driver is "in the very nature of modern automobile use." *Roth* v. *Old Republic Ins. Co.*, 269 So. 2d 3,

6–7 (Fla. 1972). *Kennedy* thus got it exactly backwards when it characterized sharing of rental cars as a sinister, "deceptive" act rather than what it really is: "a largely harmless and even expected occurrence that can be easily managed by the owner." 638 F.3d at 167 (seeking to draw contrast with renters who return their vehicles late).

The fine print of a private contract of adhesion "cannot control the paramount constitutional question" whether a person has a reasonable expectation of privacy. *United States* v. *Owens*, 782 F.2d 146, 150 (10th Cir. 1986). Although they can certainly be a relevant factor, a defendant's formal legal rights in relation to a given location are rarely dispositive of whether he reasonably expects that place to be open for "public inspection." *California* v. *Greenwood*, 486 U.S. 35, 41 (1988); *see also, e.g.*, *United States* v. *Chaves*, 169 F.3d 687, 690 (11th Cir. 1999) ("lack of ownership is not dispositive"). The Third Circuit's approach conflicts with this Court's Fourth Amendment precedent and cannot be sustained.

B. Unlisted Drivers Can Have Cognizable Property Interests in Rental Cars.

The Court has warned that Fourth Amendment protections should not hinge on "arcane distinctions developed in property" law, *Rakas*, 439 U.S. at 143, but the Third Circuit's test is even worse: It hinges on a *misunderstanding* of property law. Under the common and statutory law of many jurisdictions, it is simply untrue that "an unauthorized driver has no cognizable property interest in the rental vehicle." *Kennedy*, 638 F.3d at 165. To the contrary, in a number of States a person who drives a rental car with the

renter's permission has legal rights and duties that arise from that temporary control of the car. *See, e.g.*, *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. Ct. App. 1996) (unlisted rental-car driver's "use of the car created a bailment"). When it comes to the question of who is an "authorized" driver, the property law in these States does what the Third Circuit's approach does not—it accounts for the substantial difference between a driver who has the renter's permission to use the car and someone who has no permission at all.

State law often defines the contours of property interests protected by the Constitution. *See Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created ... from an independent source such as state law."); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 80 (1998) ("[S]tate law typically defines the property rights given constitutional protection against federal officials."). Bailment law governs the rights and obligations of persons who receive possession of an item, such as a car, from someone who has permission to use the item from the owner. Such persons are referred to as "permittees," "sub-permittees," "bailees," or "sub-bailees."

At common law, anyone who acquired possession of an item, whether with the ultimate owner's permission or not, was required "to be diligent, to keep the chattel as his own," or be liable to the owner. Samuel Stoljar, *The Early History of Bailment*, 1 Am. J. Legal Hist. 5, 22 (1957). Further, anyone who acquired such liability also had the corresponding right to exclude others and, for a limited period, obtained sole custody and control of the item. Albert S. Thayer, *Possession*,

18 Harv. L. Rev. 196, 206 (1905) ("If a bailee intends to exclude strangers to the title, it is enough for possession under the law, although he is perfectly ready to give the thing up to its owner at any moment." (citation omitted)); *see also, e.g.*, *State* v. *Sanders*, 614 P.2d 998, 1000, 1004 (Kan. Ct. App. 1980) (recognizing a sub-permittee's possessory interest in a car). Accordingly, some States hold a sub-bailee, a bailee, and the owner all equally liable for negligence. *See, e.g.*, *Pabon* v. *InterAmerican Car Rental, Inc.*, 715 So. 2d 1148, 1150 (Fla. Ct. App. 1998).

With the development of automobiles and rental vehicles, States have built an array of doctrines on top of this common-law background to regulate sub-bailees. Several jurisdictions treat undisclosed drivers of rental cars as foreseeable contingencies and permit additional drivers to retain possessory interests in rental cars while they are driving them. In New York, for example, rental-car agencies are considered to have "constructively" consented to additional drivers for certain purposes despite contractual provisions restricting use of the vehicle to the renter and his immediate family. *Motor Vehicle Accident Indem. Corp.*, 319 N.E.2d at 184. These jurisdictions reason that rental-car companies "kn[o]w or certainly should ... know[] that the probabilities [of] vehicles coming into the hands of another person are entirely too great" to treat an unlisted driver as a legal nonentity. *Ibid.*; *cf. United States* v. *Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996) (agreeing "that if the driver of a rental car has the permission of the lessee to drive the vehicle, then he has a legitimate possessory interest"). Similarly, in California, "specific admonition[s] not to permit anyone else to drive" are inapplicable where "the owner

has committed the general use of the car to the permittee," as in the case of rentals. 8 Cal. Jur. 3d Automobiles § 529 ("The owner of a motor vehicle is responsible for negligent or wrongful acts or omissions by a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee ... ."). Florida law is similar. *See, e.g.*, *Chandler*, 78 So. 3d at 1297 (rental-car companies "in actuality intrust[] th[e] automobile to the renter for all ordinary purposes for which an automobile is rented," and unauthorized drivers do not change this relationship regardless of "[t]he restrictions agreed upon"); *see also Campbell*, 59 N.E.3d at 400 ("authorization to use a rental vehicle may be provided by renters as well as by the rental company in at least some circumstances").

These States' recognition of unlisted drivers' possessory interests coheres with the property-law analysis in other contexts. In a recent Fourth Amendment case, for example, the Ninth Circuit held that the organizers of an event at a warehouse had a cognizable possessory interest (and thus a reasonable expectation of privacy) in the warehouse because they received the permission of the sublessee to use the facility. *Lyall* v. *City of Los Angeles*, 807 F.3d 1178, 1189 (2015).

The Third Circuit's blithe assertion that "an unauthorized driver has no cognizable property interest in the rental vehicle," *Kennedy*, 638 F.3d at 165, ignores the property-law principles governing sub-bailments and similar arrangements. So even if formal property rights were dispositive of a person's reasonable expectation of privacy, the court of appeals' approach is on unsteady ground.

C. The Rental-Contract Terms Forming the Basis for the Third Circuit's Ruling Have Been Rejected as Unenforceable.

Courts that do not recognize the reasonableness of an unlisted rental-car driver's expectation of privacy base their conclusion largely on the rental contract's prohibition of unlisted drivers. *See, e.g.*, *United States* v. *Roper*, 918 F.2d 885, 886 (10th Cir. 1990) (no reasonable expectation of privacy for an unlisted driver because "[t]he rental contract provided that the car could only be driven by the lessee"). But courts consistently refuse to enforce those clauses in the very context in which they are intended to apply—insurance coverage.

Rental-car companies rely on unlisted-driver prohibitions "as a basis for negating omnibus [insurance] coverage which otherwise would have been available to the lessee or his forbidden permittees." Irvin E. Schermer & William J. Schermer, 1 *Automobile Liability Insurance* § 6:18 (4th ed. 2008). But "a substantial number of courts" have "refused to permit a violation of the prohibition" to negate that insurance coverage. *Ibid.*; *see also Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982) (unlisted driver "was covered" by the contract's insurance clause because "he had permission from the named" driver "to drive the automobile," despite the rental contract's prohibition of unlisted drivers); *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 350 N.E.2d 616, 617 (N.Y. 1976) (per curiam) ("recogniz[ing]" the "realities and exigencies of commercial automobile rentals"); *"Permissive" Use of Automobile—Delegation of Permission to Second Permittee*, 17 Am. Jur. Proof of Facts 3d 409, § 11 (1992)

("courts in many jurisdictions tend to ignore express prohibitions against delegation").

Legal doctrines like "implied consent," "lawful possession," and "initial permission" "defang" the contractual prohibition on unlisted drivers in the insurance-coverage context. Schermer & Schermer, *supra*, § 6:18 (internal quotation marks omitted). Thus, courts have held that a "person may be in lawful possession of an automobile if he is given possession by someone using the automobile with the express permission of the owner, even though" the rental contract prohibits unlisted drivers. *Ins. Co. of N. Am.* v. *Aetna Life & Cas. Co.*, 362 S.E.2d 836, 840 (N.C. Ct. App. 1987). And when a renter gives permission to an unlisted driver to operate the rental car, "subsequent use short of actual conversion or theft" is "permissive." *State Farm Mut. Auto. Ins. Co.* v. *Budget Rent-A-Car Sys., Inc.*, 359 N.W.2d 673, 676 (Minn. Ct. App. 1984) (internal quotation marks omitted).

Courts have reasoned that prohibiting unlisted drivers from operating rental cars with the renter's permission would nullify an essential "purpose" of the rental car for which the renter had bargained. *BATS, Inc.* v. *Shikuma*, 617 P.2d 575, 577 (Haw. Ct. App. 1980) (per curiam) (insured was still "using" the rental vehicle even when an unlisted driver was returning it, despite the rental contract's unlisted-driver prohibition). "Rental of an automobile is for a broad, almost unfettered, use," including having unlisted drivers operate the vehicle. *State Farm Mut. Auto. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 533 (Mo. Ct. App. 1994).

Some courts have concluded that rental-car companies must anticipate that unlisted drivers will operate their rental cars, and so must not actually intend to enforce the prohibition. It is "foreseeable and inevitable" that some rental vehicles "will be operated in violation of a restrictive lease agreement." *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 49 A.D.2d 613, 614 (N.Y. App. Div. 1975), *modified*, 350 N.E.2d 616 (N.Y. 1976). Rental-car companies do "not have a reasonable basis for believing that" driver restrictions will "be carried out," and therefore are "deemed to have given implied permission to the use of the subject automobile without the said restriction." *Fin. Indem. Co.* v. *Hertz Corp.*, 38 Cal. Rptr. 249, 254 (Cal. Dist. Ct. App. 1964) (affirming district court's findings).

This widespread rejection of unlisted-driver restrictions in rental-car contracts further undermines the Third Circuit's already wobbly rule. Courts often refuse to enforce such provisions, largely on the basis that rental companies are well aware that renters routinely allow unlisted persons to drive the rental vehicle. There can be no basis for inferring that those same, largely null contract clauses deprive unlisted drivers of their constitutionally protected expectation of privacy.

* * *

As this Court made clear in *Rakas*, Fourth Amendment protections do not depend on "arcane distinctions developed in property" law. 439 U.S. at 143. And this makes good sense: Courts take a variety of often conflicting approaches in the context of rental vehicles. Americans' reasonable expectations of privacy do not hinge on which property test a given court

might use. Instead, social conceptions of reasonableness can establish an expectation of privacy protected by the Constitution. Here, the Third Circuit—following the lead of several other courts—erred in holding that neither strand of this Court's Fourth Amendment jurisprudence permitted petitioner to challenge the search at issue.

CONCLUSION

This Court's review is warranted to clarify the Fourth Amendment rights of unlisted rental-car drivers.

Respectfully submitted.

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June 12, 2017

No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
MAY 11, 2017
CERTIORARI GRANTED SEPTEMBER 28, 2017

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United States District Court
Middle District of Pennsylvania (Harrisburg)
CRIMINAL DOCKET FOR CASE #:
1:14-cr-00321-WWC-1

Case title: USA v. Byrd

Date Filed: 12/17/2014
Date Terminated: 02/24/2016

Assigned to: Honorable William W. Caldwell

Pending Counts	**Disposition**
21:841 CONTROLLED SUBSTANCE - SELL, DISTRIBUTE, OR DISPENSE (1)	Imprisonment 120 months on Count-1 and 36 months on Count-2 to run concurrently. Supervised Release 3 years on Count-1 and 1 year on Count-2 to run concurrently. Fine of $800.00 on Count-1; Special Assessment of $100.00 on each of Counts 1 and 2.
18:931 PROHIBITION ON PURCHASE, OWNERSHIP OR POSSESSION OF BODY ARMOR BY VIOLENT FELON (2)	Imprisonment 120 months on Count-1 and 36 months on Count-2 to run concurrently. Supervised Release 3 years on Count-1 and 1 year on Count-2 to run concurrently. Fine of $800.00 on Count-1; Special Assessment of $100.00 on each of Counts 1 and 2.

Highest Offense Level Disposition (Opening)
Felony

Terminated Counts
None

Highest Offense Level Disposition (Terminated)
None

Complaints
None

Date Filed	#	Docket Text
12/17/2014	1	INDICTMENT as to Terrance Byrd (1) count(s) 1, 2. (aaa) (Entered: 12/17/2014)
04/13/2015	28	MOTION to Suppress All Evidence Resulting From the Illegal Stop of Terrence Byrd's Vehicle by Terrence Byrd. (Attachments: # 1 Certificate of Nonconcurrence, # 2 Proposed Order)(Thornton, Thomas) Modified on 4/15/2015 (pjr). (Entered: 04/13/2015)

Date Filed	#	Docket Text
04/13/2015	29	BRIEF IN SUPPORT by Terrence Byrd re 28 Unopposed MOTION to Suppress All Evidence Resulting From the Illegal Stop of Terrence Byrd's Vehicle Brief in Opposition due by 4/30/2015 (Attachments: # 1 Exhibit(s))(Thornton, Thomas) (Entered: 04/13/2015)
04/28/2015	31	BRIEF IN OPPOSITION by USA as to Terrence Byrd re 28 Unopposed MOTION to Suppress All Evidence Resulting From the Illegal Stop of Terrence Byrd's Vehicle Reply Brief due by 5/15/2015. (Behe, William) (Entered: 04/28/2015)
05/27/2015	33	ORDER as to Terrence Byrd. A Hearing on dft's mtn to suppress has been set for 6/16/2015 @ 10:30 AM in Harrisburg - Courtroom 3 before Honorable William W. Caldwell. Courtroom is subject to change.. Signed by Honorable William W. Caldwell on 05/27/15. (ma) (Entered: 05/27/2015)

Date Filed	#	Docket Text
06/15/2015	34	EXHIBIT(S) by Terrence Byrd re (Attachments: # 1 Exhibit(s), # 2 Exhibit(s), # 3 Exhibit(s), # 4 Exhibit(s), # 5 Exhibit(s), # 6 Exhibit(s), # 7 Exhibit(s), # 8 Exhibit(s), # 9 Exhibit(s), # 10 Exhibit(s))(Thornton, Thomas) (Entered: 06/15/2015)
06/16/2015	36	EXHIBIT LIST by USA, Terrence Byrd as to Terrence Byrd from suppression hearing held 6/16/15 (ma) (Entered: 06/16/2015)
06/19/2015	37	COURT REPORTER NOTES RE: Terrence Byrd filed by Wendy Yinger of Suppression Hearing before Judge Caldwell on 6/16/2015. In accordance with 28 U.S.C. Section 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Middle District of PA before Judge Caldwell on 6/16/2015. By s/ Wendy Yinger. (Court Reporter Notes are viewable by court staff only). (ctrep7) (Entered: 06/19/2015)

Date Filed	#	Docket Text
06/24/2015	38	ORDER: The Gvt shall file a supplemental brief, re MOTION to Suppress 28 within 15 days, and the Dft shall file a response no later than 15 days thereafter as to Terrence Byrd.. Signed by Honorable William W. Caldwell on 06/24/15. (ma) (Entered: 06/24/2015)
06/25/2015	39	Unopposed MOTION Notice of Intent to Rest Case by Terrence Byrd. (Attachments: # 1 Proposed Order)(Thornton, Thomas) (Entered: 06/25/2015)
06/25/2015	40	Motion to Take Testimony and Extend Briefing Period (Attachments: # 1 attachment, # 2 Proposed Order)(Behe, William) (Entered: 06/25/2015)

Date Filed	#	Docket Text
06/26/2015	41	ORDER granting the Gvt's mtn to take testimony and extend briefing period 40 as to Terrence Byrd: Continuation of hearing re. dft's mtn to suppress 28 is set for 7/8/2015 @ 10:30 AM in Harrisburg - Courtroom 1 before Honorable William W. Caldwell.. Signed by Honorable William W. Caldwell on 06/26/15. (ma) (Entered: 06/26/2015)
06/29/2015	42	ORDER granting dft's Unopposed MOTION Notice of Intent to Rest Case 39 as to Terrence Byrd.. Signed by Honorable William W. Caldwell on 06/29/15. (ma) (Entered: 06/29/2015)

Date Filed	#	Docket Text
06/30/2015	43	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Suppression Hearing Proceedings as to Terrence Byrd held on 6/16/2015 before Judge Caldwell. Court Reporter Wendy Yinger, Telephone number 717-440-1535. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/21/2015. Redacted Transcript Deadline set for 7/31/2015. Release of Transcript Restriction set for 9/28/2015. (ctrep7) (Entered: 06/30/2015)

Date Filed	#	Docket Text
07/08/2015	46	COURT REPORTER NOTES re Terrence Byrd filed by L. Shuey of Suppression Hearing before Judge Caldwell on 7/8/15. In accordance with 28 U.S.C. Section 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Middle District of PA before Judge Caldwell on 7/8/15. By s/ L. Shuey. (Court Reporter Notes are viewable by court staff only). (ctrep1,) (Entered: 07/08/2015)

Date Filed	#	Docket Text
07/08/2015	47	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Suppression Hearing Proceedings as to Terrence Byrd held on 7/8/15 before Judge Caldwell. Court Reporter L. Shuey, Telephone Number 717-215-1270. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/29/2015. Redacted Transcript Deadline set for 8/10/2015. Release of Transcript Restriction set for 10/6/2015. (ctrep1,) (Entered: 07/08/2015)
07/22/2015	49	MOTION for Extension of Time to File Response/Reply by USA as to Terrence Byrd. (Attachments: # 1 Proposed Order)(Behe, William) (Entered: 07/22/2015)

Date Filed	#	Docket Text
07/24/2015	50	ORDER granting gov't's motion for ext of time 49 to file supp'l brief in opp to deft's motion to suppress evidence until 7/31/15. (See order for complete details.) Signed by Honorable William W. Caldwell on 7/23/15. (ki) (Entered: 07/24/2015)
07/28/2015	51	SUPPLEMENT filed by USA re: Terrence Byrd to 31 Brief in Opposition. (pjr) (Entered: 08/06/2015)
08/21/2015	54	REPLY BRIEF by Terrence Byrd re 28 Unopposed MOTION to Suppress All Evidence Resulting From the Illegal Stop of Terrence Byrd's Vehicle (Attachments: # 1 Exhibit(s))(Thornton, Thomas) (Entered: 08/21/2015)
08/26/2015	55	MEMORANDUM re MOTION to Suppress 28 as to Terrence Byrd (Order to follow as separate docket entry). Signed by Honorable William W. Caldwell on 8/26/15. (ma) (Entered: 08/26/2015)

Date Filed	#	Docket Text
08/26/2015	56	ORDER: In accord with the Memorandum 55 filed this date; Dft's MOTION to Suppress All Evidence Resulting From the Illegal Stop 28 is Denied as to Terrence Byrd.. Signed by Honorable William W. Caldwell on 8/26/15. (ma) (Entered: 08/26/2015)
09/09/2015	59	Unopposed MOTION for Reconsideration Denial of Suppression by Terrence Byrd. (Thornton, Thomas) (Entered: 09/09/2015)
09/22/2015	63	Order 59 (Thornton, Thomas) (Entered: 09/22/2015)
10/01/2015	67	PLEA AGREEMENT as to Terrence Byrd (Behe, William) (Entered: 10/01/2015)

Date Filed	#	Docket Text
02/24/2016	84	JUDGMENT as to Terrence Byrd (1), Count(s) 1, 2, Imprisonment 120 months on Count-1 and 36 months on Count-2 to run concurrently. Supervised Release 3 years on Count-1 and 1 year on Count-2 to run concurrently. Fine of $800.00 on Count-1; Special Assessment of $100.00 on each of Counts 1 and 2.. Signed by Honorable William W. Caldwell on 2/24/16. (ma) (Entered: 02/24/2016)
03/07/2016	86	NOTICE OF APPEAL by Terrence Byrd re 84 Judgment, - The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Ulrich, Frederick) (Entered: 03/07/2016)

General Docket
Third Circuit Court of Appeals

Court of Appeals **Docketed:** 03/11/2016
Docket #: 16-1509 **Termed:** 02/10/2017
USA v. Terrence Byrd
Appeal From:
United States District Court for the Middle District of Pennsylvania
Fee Status: FPD appointed

UNITED STATES OF AMERICA

v.

TERRENCE BYRD,

Appellant,

Date Filed	Docket Text
03/11/2016	CRIMINAL CASE DOCKETED. Notice filed by Terrence Byrd in District Court No. 1-14-cr-00321-001. (SB)
06/15/2016	ECF FILER: ELECTRONIC BRIEF on behalf of Appellant Terrence Byrd, filed. Certificate of Service dated 06/15/2016 by ECF, US mail, hand delivery. (FWU)

Date Filed	Docket Text
06/15/2016	ECF FILER: ELECTRONIC VOLUME I of JOINT APPENDIX on behalf of Appellant Terrence Byrd, filed. Certificate of Service dated 06/15/2016 by hand delivery, ECF, US mail. (FWU)
06/15/2016	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellant Terrence Byrd, filed. Certificate of Service dated 06/15/2016 by US mail, ECF, hand delivery. (FWU)
06/15/2016	ECF FILER: Unopposed Motion filed by Appellant Terrence Byrd to Lodge Exhibits in Digital Format (Appendix Volume 3). Certificate of Service dated 06/15/2016. [Entry edited to reflect correct event]--[Edited 06/17/2016 by EMA] (FWU)
06/20/2016	HARD COPY RECEIVED from Appellant Terrence Byrd - Appendix. Copies: 4. Volumes: 3 (Volume I attached to Brief); Volume III submitted in digital format. (MS)

Date Filed	Docket Text
07/13/2016	EXHIBIT(S) on flash drive consisting of exhibits outlined in volume 3 of appendix on behalf of Appellant Terrence Byrd, filed. See Clerk Order dated 6/30/2016. Copies: 4. Location: Safe. SEND TO MERITS PANEL (GPK)
09/19/2016	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee USA, filed. Certificate of Service dated 09/19/2016 by ECF, US mail. (SRC)
10/03/2016	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellant Terrence Byrd, filed. Certificate of Service dated 10/03/2016 by ECF, US mail, hand delivery. (FWU)
12/06/2016	COURT MINUTES OF ARGUED/SUBMITTED CASES. [16-2781, 16-1447, 16-1247, 14-4694, 15-2694, 15-4039, 16-1654, 16-1655, 16-1656, 14-4423, 16-1509, 16-3142] (TLG)

Date Filed	Docket Text
12/06/2016	SUBMITTED on Tuesday, December 6, 2016. Panel: FISHER, KRAUSE and *MELLOY, Circuit Judges.* (Honorable Michael J. Melloy, Senior Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation) (TLG)
02/10/2017	NOT PRECEDENTIAL OPINION Coram: FISHER*, KRAUSE and MELLOY**, Circuit Judges. Total Pages: 9. Judge: MELLOY Authoring. * Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017. **Honorable Michael J. Melloy, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation. (PDB)
02/10/2017	JUDGMENT, Affirmed. All of the above in accordance with the opinion of this Court. Costs shall not be taxed. (PDB)
03/06/2017	MANDATE ISSUED, filed. (PDB)

Date Filed	Docket Text
05/17/2017	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Terrence Byrd on 05/11/2017 and placed on the docket 05/16/17 as Supreme Court Case No. 16-1371. (CND)

RENTAL AGREEMENT NUMBER 106479455

Customer Name : REED,LATHEAN
Drivers Lic Number : [redacted]
Methods of Payment : PREPAID ID#MAT

RESERVATION NUMBER 40625057-CR-5 SPACE NO. 513

Budget Car Bus : 67081806
Plate Number : NJ YJ8E88
Veh Description : GRY FORD FUSION FWD
Odometer Out : 3660 Mis
Fuel Gauge Reading: Full

Pickup Date/Time : SEP 17,2014 10:26 AM
Pickup Location : 30 ROUTE 46
WAYNE,NJ,07470,US

Return Date/Time : SEP 20,2014 09:00 AM
Return Location : 30 ROUTE 46
WAYNE,NJ,07470,US

Additional Fees May Apply If Changes Are Made To Your Return Date, Time And/Or Location.

YOUR ESTIMATED VEHICLE CHARGES

RATE CHART	DAY	TIME AND MILEAGE		
HRLY :	39.99			
DLY :	46.00	4DYS 46.00=	184.00	
WKLY :	275.00			
MTHLY:				
Mls : Unlimited				
Agreed Upon Upgrade at	10.00/Day I			
Your Estimated Time & Mileage:			184.00	
ENERGY RECOVERY FEE .60 /DY		+	2.40	
6.05% Concession Recovery Fee		+	11.31	
Estimated Subtotal Charges:			197.71	
Sales Tax 7.000%		+	13.84	
MVA LICENSE RECAP $ 1.10		+	1.10	
AUTHORITY FEE 5.00 /DY		+	20.00	
YOUR ESTIMATED TOTAL CHARGES I			232.57	

YOUR OPTIONAL PRODUCTS/SERVICES

Loss Damage Waiver	27.99/Day	Declined
Personal Accident and Effects	6.75/Day	Declined
Emergency Sickness Plan	5.00/Day	Declined
Supplemental Liability Insurance	15.75/Day	Declined

By my initials I accept or decline optional services/products as shown above. I _____

Please return the vehicle with the same fuel level as you received it. If you do not, additional fuel fees may apply:000-074 Mls equals a 39.99 flat rate fee. 075 Mls and above equals .4277 per Ml or 9.410 per Gal . I _____

NOTICE NOTICE NOTICE NOTICE NOTICE NOTICE

Loss Damage Waiver is optional. An added daily cost of 27.99 covers your responsibility for damage to our car. Check with your insurer as this may be duplicative of your own car insurance. I agree the charges listed above are estimates and that I have reviewed/agreed to all rate/conditions here are in the rental jacket. No additional drivers allowed without prior written consent. Tickets, fines and admin fees to be charged to this rental. I _____

If you have questions regarding this rental, call us at 973-785-2332 This vehicle was rented to you by BUDGET

JA 19

ADDENDUM TO RENTAL AGREEMENT

In connection with my (I) Rental Application ( ) Additional Driver's Application to Budget Rent a Car System, INC. ("Budget"), I certify that:

- I have a currently valid drivers license, not suspended, revoked, expired, cancelled, surrendered or improperly altered.
- I have not had 3 or more convictions for moving violations within the past 24 months (including seat belt violations).
- I have not been convicted of DWI/SUI/DUAI within the past 36 months.
- I have not been convicted of leaving the scene of an accident (hit and run) or failure to report an accident within the past 36 months.
- I have never been convicted of obtaining a vehicle unlawfully, possessing a stolen vehicle, or using a vehicle in a crime or in connection with an unlawful act.
- I have not been convicted of reckless driving within the past 36 months.
- I have not had 3 or more accidents within the past 36 months.

I understand that Budget regards the facts to which I am certifying as material to its decision to rent or permit me to drive its vehicle, and is relying on the accuracy and truthfulness of this certification. I further understand and agree that if I provide false or misleading information, my use of the vehicle is prohibited and unauthorized. This may result in any and all coverage otherwise provided by the Rental Agreement being void and my being fully responsible for all loss or damage, including liability to third parties.

I authorize Budget, in the event of an accident involving a Budget vehicle, to verify my driving record with any appropriate authority, either now or in the future, and I authorize any government motor vehicle department to release my records at the request of Budget or its designee.

I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, when on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These additional drivers must also be at least 25 years old and validly licensed.

PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES.

I understand that this document becomes an addendum to the Rental Agreement listed below.

Renter: I _____

Additional Driver: I _____

Date: [illegible] _____

(FOR OFFICE USE ONLY)

Additional Driver's License State & Number: I _____

Rental Agreement Number: 100679655 _____

Transcription of Graphics on JA 18-19

RENTAL AGREEMENT NUMBER 180679855
Customer Name: REED, LATASHA
Drivers Lic Number: USMJXXXXXXXX9722
Methods of Payment: MASTER XX8443

RESERVATION NUMBER 48825057-05-5
SPACE NO. E13
Budget Car Num: 6 7 0 8 1 2 0 6
Plate Number: NJ Y1BE6B
Veh Description: GRY FORD FUSION FWD
Odometer Out: 7668 MIs
Fuel Gauge Reading: Full

Pickup Date/Time: SEP 17,2014@10:26 AM
Pickup Location: 50 Route 46
WAYNE,NJ,07470,US

Return Date/Time: SEP 20,2014@04:00 PM
Return Location: 50 Route 46
WAYNE,NJ,07470,US

Additional Fees May Apply If Changes Are Made To Your Return Date, Time And/Or Location.

YOUR ESTIMATED VEHICLE CHARGES

MIN	1 DAY	MAX	DAY
	RATE CHART	TIME AND MILEAGE	
HRLY:	34.50		
DLY:	46.00	4DY@ 46.00=	184.00
WKLY:	275.00		
MTHLY:			
MIs:	Unlimited		

Agreed Upon Upgrade at 10.00/Day X____		
Your Estimated Time & Mileage:		184.00
ENERGY RECOVERY FEE .60/DY	+	2.40
6.00% Concession Recovery Fees	+	11.31
Estimated Subtotal Charges:		197.71
Sales Tax 7.000%	+	13.84
VEH LICENSE RECOUP % 1.10	+	2.02
SECURITY FEE 5.00 /DY	+	20.00
YOUR ESTIMATED TOTAL CHARGES X\s\		233.57

YOUR OPTIONAL PRODUCTS/SERVICES

Loss Damage Waiver	27.99/Day	Declined
Personal Accident and Effects	6.95/Day	Declined
Emergency Sickness Plan	5.00/Day	Declined
Supplemental Liability Insurance	15.75/Day	Declined

By my initials I accept or decline optional services/products as shown above. X\s\

Please return the vehicle with the same fuel level as you received it. If you do not, additional fuel fees may apply: 000-074 MIs equals a 13.99 flat rate fee. 075 MIs and above equals .4277 per MI or 9.410 per Gal. X\s\

---------NOTICES---------BUDGET---------NOTICES----

Loss Damage Waiver is optional. An added daily cost of 27.99 covers your responsibility for damage to our car. Check with your insurer as this may be duplicative of your own car insurance. I agree the charges listed above are estimates and that I have

reviewed/agreed to all notices/terms here and in the rental jacket. No additional drivers allowed without prior written consent. Tickets, fines and admin fees to be charged to this rental. X___\s____

If you have questions regarding this rental, call us at 973-785-2332

This vehicle was rented to you by SACHAN

ADDENDUM TO RENTAL AGREEMENT

In connection with my {X} Rental Application { } Additional Driver's Application to Budget Rent a Car System, INC. ("Budget"), I certify that:

* I have a currently valid driver's license, not suspended, revoked, expired, cancelled, surrendered or improperly altered.
* I have not had 3 or more convictions for moving violations within the past 24 months (including seat belt violations).
* I have not been convicted of DWI/DUI/DWAI within the past 36 months.
* I have not been convicted of leaving the scene of an accident (hit and run) or failure to report an accident within the past 36 months.
* I have never been convicted of obtaining a vehicle unlawfully, possessing a stolen vehicle, or using a vehicle in a crime or in connection with an unlawful act.
* I have not been convicted of reckless driving within the past 36 months.
* I have not had 3 or more accidents within the past 36 months.

I understand that Budget regards the facts to which I am certifying as material in its decision to rent or permit me to drive its vehicle, and is relying on the accuracy and truthfulness of this certification. I further understand and agree that if I provide false or misleading information, my use of the vehicle is prohibited and unauthorized. This may result in any and all coverage otherwise provided by the Rental

Agreement being void and my being fully responsible for all loss or damage, including liability to third parties.

I authorize Budget, in the event of an accident involving a Budget vehicle, to verify my driving record with any appropriate authority, either now or in the future, and I authorize any government motor vehicle department to release my records at the request or Budget or its designee.

I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's coemployee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed.

PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES.

I understand that this document becomes an addendum to the Rental Agreement listed below.

Renter: X\s\
Additional Driver: X_____
Date: 17SEP14 _____

(FOR OFFICE USE ONLY)
Additional Driver's License State & Number: X_____

Rental Agreement Number: 180679856_____

HBG221-00165618 NCICB 20140917 19:49:00
20140917 19:49:00 047D00B042
3L01047D00B0422QH
PAPSP3600
THIS NCIC INTERSTATE IDENTIFICATION INDEX MULTIPLE RESPONSE IS THE RESULT OF YOUR INQUIRY ON NAM/BYRD,TERRENCE SEX/M RAC/B DOB/19770719
PUR/C
ATN/TROOPER ERDMAN

NAME	FBI NO.	INQUIRY DATE
CARTER,JAMES	748535EB2	2014/09/17

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES
M	B	1972/07/19	600	175	BRO

HAIR PHOTO
BRO Y

BIRTH PLACE
NEW YORK

FINGERPRINT CLASS PATTERN CLASS
PM PI 15 PO 18
07 PO PO 21 12

ALIAS NAMES
BYRD,TERRENCE T BYRD,TERRANCE
BYRD,TERRENCE

OTHER SCARS-MARKS-

BIRTH DATES TATTOOS	SOCIAL SECURITY
1977/07/19 TAT UR ARM	[REDACTED]
1977/05/27 TAT L SHLD	[REDACTED]

TAT UL ARM
TAT L ARM
TAT R ARM
TAT R SHLD

IDENTIFICATION DATA UPDATED 2014/07/23

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE FOLLOWING:
NEW JERSEY - STATE ID/NJ279332C
FBI - FBI/748535EB2

END - 1ST NCIC III RECORD OF MULTIPLE RESPONSE

NAME	FBI NO.	INQUIRY DATE
FARMER,TERRANCE LAMONT	272J13WA8	2014/09/17

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYES
M	B	1977/04/07	511	190	BRO

HAIR	PHOTO
BLK	Y

BIRTH PLACE

HBG221-00165622 NLETS 20140917 19:49:49
20140917 19:49:48 047D00B043
CR.NJIII0000
16:49 22925
09/17/2014 36752 PAPSP3600
*0B0432QR

TXT

HDR/2L01047D00B0432QR
ATN/TROOPER ERDMAN;N

THIS RECORD IS BASED ON THE SID NUMBER IN YOUR REQUEST-SID/NJ279332C
NEW JERSEY CRIMINAL HISTORY DETAILED RECORD
USE OF THIS RECORD IS GOVERNED BY FEDERAL AND STATE REGULATIONS. UNLESS FINGERPRINTS ACCOMPANIED YOUR INQUIRY, THE STATE BUREAU OF IDENTIFICATION CANNOT GUARANTEE THIS RECORD RELATES TO THE PERSON WHO IS

THE SUBJECT OF YOUR REQUEST. USE OF THIS RECORD SHALL BE LIMITED SOLELY TO

THE AUTHORIZED PURPOSE FOR WHICH IT WAS GIVEN AND IT SHALL NOT BE DISSEMINATED TO ANY UNAUTHORIZED PERSONS. TO ELIMINATE A POSSIBLE DISSEMINATION VIOLATION, AND TO COMPLY WITH FUTURE EXPUNGEMENT ORDERS,

THIS RECORD SHALL BE DESTROYED *IMMEDIATELY* AFTER IT HAS SERVED ITS INTENDED AND AUTHORIZED PURPOSES. ANY PERSON VIOLATING FEDERAL OR STATE

REGULATIONS GOVERNING ACCESS TO CRIMINAL HISTORY RECORD INFORMATION MAY BE SUBJECT TO CRIMINAL AND/OR CIVIL PENALTIES. THIS RECORD IS CERTIFIED AS A

TRUE COPY OF THE CRIMINAL HISTORY RECORD INFORMATION ON FILE FOR THE ASSIGNED STATE IDENTIFICATION NUMBER.

STATE ID NO. 279332C FBI NO. 748535EB2 DATE REQUESTED. 09/17/2014

NAME: CARTER, JAMES

SEX RACE BIRTH DATE HEIGHT WEIGHT EYES
M B 07/19/1972 600 175 BRO
HAIR BIRTH PLACE
BRO NY

RECEIVING AGENCY: PAPSP3600 U.S. CITIZEN: YES
FPC: WWWWW// AFIS NO: III: MULTI STATE
DNA SAMPLE STATUS:
PROFILE IN CODIS

ALIAS NAMES/OTHER BIRTH DATES
BYRD, TERRANCE 07/19/1972
BYRD, TERRENCE 07/19/1972
BYRD, TERRENCE 05/27/1977
BYRD, TERRENCE 07/19/1977
BYRD, TERRENCE T. 07/19/1972
BYRD, TERRENCE T. 07/19/1977
SOCIAL SECURITY NUMBERS
[REDACTED] [REDACTED] [REDACTED]
SCARS/MARKS/TATTOOS/MISC NUMBERS
TATTOO LEFT ARM CHINESE WRITING
TATTOO LEFT ARM FULL SLEEVE
TATTOO LEFT SHOULDER CHINESE WRITING

HBG221-00165621 NLETS 20140917 19:49:47
20140917 19:49:47 047D00B043
CR.WVFBINF00
16:49 57509
09/17/2014 36749 PAPSP3600
*0B0432QR
TXT
HDR/2L01047D00B0432QR
ATN/TROOPER ERDMAN
********** CRIMINAL HISTORY RECORD*******

**********Introduction **********

This rap sheet was produced in response to the following request:

Purpose Code C
Attention TROOPER ERDMAN

The information in this rap sheet is subject to the following caveats:

(US)
(US)
(US)
**********IDENTIFICATION **********

Subject Name(s)

CARTER, JAMES
BYRD, TERRANCE (AKA)
BYRD, TERRENCE (AKA)
BYRD, TERRENCE T (AKA)

Subject Description

FBI Number	State Id Number
748535EB2	NJ279332C

Social Security Number
[REDACTED]

Sex	Race
Male	Black

Height	Weight	Date of Birth
6'00"	175	1972-07-19
		1977-05-27
		1977-07-19

Hair Color	Eye Color
Brown	Brown

Scars, Marks, and Tattoos

Code	Description, Comments, and Images
TAT R ARM	, TATTOO ON RIGHT ARM
TAT L SHLD	, TATTOO ON LEFT SHOULDER
TAT R SHLD	, TATTOO ON RIGHT SHOULDER
TAT UL ARM	, TATTOO ON UPPER LEFT ARM
TAT UR ARM	, TATTOO ON UPPER RIGHT ARM
TAT L ARM	, TATTOO ON LEFT ARM

Place of Birth	Citizenship
New York	United States

Caution Information

Caution	WANTED - CONFIRM THAT WANT IS STILL OUTSTANDING. AGENCY-

SHERIFF'S OFFICE BRIDGETON (NJ0060000) NIC-W431447940WANTED-NCIC #W431447940 BYRD,TERRANCE PROB VIOLATION - SEE MIS (IDENTIFY ORIGINAL OFFENSE) CASE #0714-206 DATE OF WARRANT 0C/23/2014 NOTIFY NJ0060000 SHERIFF'S OFFICE BRIDGETON NJ CAUTION-QUERY NCIC FOR REASON OF CAUTION AND POSSIBLE CROSS REFERENCE INFORMATION

**********CRIMINAL HISTORY **********

********** INDEX OF AGENCIES **********

Agency SHERIFF'S OFFICE; NJ0060000;

* * * END OF RECORD * * *

COMMONWEALTH OF
PENNSYLVANIA

VS. DISTRICT NO. 12-3-03

TERRENCE TILLMAN
BYRD

TRANSCRIPT OF PROCEEDINGS
PRELIMINARY HEARING

BEFORE: WILLIAM WENNER,
DISTRICT JUDGE

DATE: OCTOBER 9, 2014, 3:55 P.M.

PLACE: 5925 STEVENSON AVENUE,
SUITE B
HARRISBURG, PENNSYLVANIA

APPEARANCES:

OFFICE OF THE DISTRICT ATTORNEY
BY: JOSEPH CARDINALE, ESQUIRE

FOR – COMMONWEALTH

PERRY SHORE WEISENBERGER & ZEMLOCK
BY: CASEY G. SHORE, ESQUIRE

FOR – DEFENDANT

LISA BRUAW, REPORTER
NOTARY PUBLIC

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WITNESS

FOR COMMON-WEALTH	DIRECT	CROSS	RE-DIRECT	RE-CROSS
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[3]

THE COURT: Do you need me to read the criminal complaint?

MR. SHORE: No, waive reading, Judge.

THE COURT: Commonwealth ready to proceed?

MR. CARDINALE: We are, Your Honor.

THE COURT: Call your first witness, please.

MR. CARDINALE: Commonwealth calls Trooper David Long.

DAVID LONG, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARDINALE:

Q Good morning, Trooper Long. How are you currently employed?

A The Pennsylvania State Police.

Q How long have you worked there?

A Eight years.

Q Were you working there in your capacity as a trooper on September 17th, 2014?

A I was.

[4]

Q What were your duties that day?

A I'm currently assigned to the Bureau of Criminal Investigation Shield Unit. I was performing patrol duties on Interstate 81.

Q And around 6:20 that day what were you doing?

A I was sitting in the center median in Dauphin County approximately Mile Marker 76 observing southbound traffic.

Q Did you notice anything suspicious?

A I observed a gray in color Ford Fusion pass my travels. I observed his hands at 10 and 2. And the operator was sitting behind the B pillar is what we would call hiding behind the B pillar.

Q And how did you pursue that vehicle?

A At that time I pulled from my stationary position. I continued to follow the vehicle southbound. The vehicle was approximately four or five vehicles traveling in the left lane in front of me. And he was behind a truck tractor at that time.

We approached Mile Marker 74.3, I believe, or let me back up. Approximately Mile Marker 75 the truck tractor moved from the left lane to the right lane. The silver Ford Fusion [5] with the

New Jersey registration continued in the left lane and continued in the left lane until Mile Marker 73.4.

At that time I caught up to the vehicle and initiated a traffic stop by activating my lights. I'm in an unmarked vehicle.

Q And you stopped the vehicle?

A Yes, on the right shoulder.

Q Did you have occasion to make contact with the operator of the vehicle?

A At that time I called out the stop to our dispatch. I approached the vehicle on the passenger side, explained the reason for the stop to the operator. The operator was visibly nervous. He was shaking and had a hard time obtaining his driver's license.

He actually did not have a driver's license. He had a piece of paper with New York identification on it. He said that he had washed his driver's license. I asked the operator of the vehicle if it was his. He stated, no, it was a rental vehicle. At that time I asked for the rental agreement.

At the time of day there was direct sunlight shining in at us which would have been [6] southbound traffic. At that time I asked the operator if we could move the traffic stop further up to Mile Marker 72 for his safety and my safety, so we moved the traffic stop up.

Q And you moved the traffic stop up. How did you proceed from there?

A I was preparing a written warning for the car. Trooper Martin arrived at that time. He backed me up on the traffic stop. As he did, I was running the operator's license, criminal history, and I noticed that the operator was not the rental agreement holder.

As I was running the criminal history the operator's name given by the New York piece of paper displayed Terrence Byrd, but when I ran the name and date of birth it came back as a James Carter, I believe it was. Yes, James Carter. There was a current warrant for probation violations out of New Jersey and that kind of delayed the process.

Trooper Martin had further conversation with Mr. Byrd as I went back and was trying to figure out and positively identify Mr. Byrd and the James Carter and check on the status of the warrant.

[7]

Q When you determined that there was an outstanding warrant how did you proceed from there?

A At that time through communications they determined that the warrant was valid and Mr. Byrd was actually Mr. Carter. Mr. Carter was Mr. Byrd. I had him step from the vehicle. New Jersey stated it was a probation violation or parole violation, one or the other, and that they did not or wouldn't extradite. It was in-state only.

So I had Mr. Byrd step to the rear of the vehicle and I went over everything with him. First I explained the communication between New Jersey and I explained the lengthy process that it took to identify him.

I noticed as I was speaking with Mr. Byrd he became or he continued to be uncomfortable and his level of nervousness began to rise. He was rocking back and forth and he would not make direct eye contact.

Q Did you ask him any questions?

A Just I asked him generally investigative questions where he was going, where he was coming from. I asked him if he rented the vehicle. He wasn't the renter of the vehicle. And based on the indicators that I had with his [8] nervousness and his actions, I asked him if there is anything illegal in the car.

At that point he looked at me and just smiled. He hesitated and said, no, there's nothing illegal in the car. I asked for consent to search the vehicle and he said at that point that he had smoked a blunt in the car earlier; that he would get it for us.

And I told him, no, we would obtain it, get the blunt out of the car. And he was back and forth whether or not he wanted us to search the car. But he did give us consent to search the car.

At that time there's only Trooper Martin and myself was there. I approached the driver's side and started to conduct my search. Mr. Byrd was on

the right shoulder. And Trooper Martin was standing at the rear of the vehicle on the right side of the vehicle, passenger side, more towards the rear but towards the center B pillar.

Mr. Byrd's hands were in and out of his pocket. He was moving back and forth. Trooper Martin stated to me that Mr. Byrd is acting—his behavior is not consistent; that there possibly could be something more in the vehicle.

Mr. Byrd said that he did snort [9] cocaine at one point in the vehicle. And at that point Trooper Martin told me to open the trunk. I opened the trunk and Trooper Martin was standing at the back of the trunk.

Trooper Martin said to me that I'm going to detain Mr. Byrd at this point. I said okay. So I was getting up. Trooper Martin just put his hands on handcuffs and said, Mr. Byrd, you're not under arrest. Mr. Byrd smiled and took off running towards the wood line.

Off duty Trooper Swope had showed up at some point during the traffic stop. I did not see him show up. And a foot pursuit ensued. Approximately 300 yards, 400 yards from the vehicles Mr. Byrd was taken into custody by Trooper Swope and Trooper Martin.

I returned to the vehicle. Mr. Byrd stated out there that there was heroin in the vehicle. And we went back and searched the vehicle, located body armor and 49 bricks of heroin.

Q And did you field-test the suspected heroin?

A Yes. When we got back to PSP Harrisburg it was field-tested.

[10]

Q And what were the results?

A Tested positive for heroin.

Q How long did you say you chased down Mr. Byrd?

A I was the last guy. I'm running 300 yards maybe a little more. It was over two fences.

MR. CARDINALE: Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. SHORE:

Q Trooper, you said that you saw when the car passed you you witnessed Mr. Byrd driving the vehicle and he was did you say hiding behind the B pillar?

A It's when the operator sits behind so when you look straight through the vehicle you didn't see any occupants. It's straight back and his arms were locked out.

Q But nothing illegal about that?

A Nothing illegal.

Q About 6:20 in the evening. What day of the week was this?

A Wednesday, I believe.

[11]

Q So under normal conditions that's pretty heavy traffic that stretch of 81. Would you agree with me?

A Absolutely.

Q And it was your testimony that whenever—did you specifically pull out to follow Mr. Byrd because of him leaning back?

A That's what caught my attention. I did not pull from my position to pull him over. That's not a violation, but that's one of the first things that got my eye to it.

Q But did you pull out to follow his vehicle?

A Yes.

Q And I believe it was your testimony that whenever you pulled out he was one of four or five cars in the left-hand lane?

A Correct. He was directly behind a truck.

Q And that's not only a fairly congested area of 81, but a lot of tractor-trailers are in that neck of the highway?

A Right.

Q And at that specific time were there a number of tractor-trailers traveling on 81?

[12]

A I would say, yes.

Q So the traffic was backed up. It wasn't a smooth flowing traffic pattern. Would you agree with me on that?

A There was a cluster of traffic is how I would say it.

Q And I apologize. I didn't pay specific attention to the mile markers that you were noting. But after the tractor-trailer in front of Mr. Byrd pulls over to the right-hand lane does he have a clear path? What happened to the other vehicles that were also in front of him?

A Yes. He was the lead vehicle in the left lane for approximately half a mile.

Q Had he passed all of the cars in the right-hand lane; in other words, did he have an opportunity to pull over in the right-hand lane?

A Yes. After the tractor-trailer moved from the left to right then the right lane was open. So after

he passed the tractor-trailer that's when he could immediately have went to the right lane.

Q Driving the speed limit? Were there any issues with speed?

A No.

[13]

Q Was that vehicle that he is driving holding up a lane of traffic in the left lane?

A Yes. It took me approximately a half mile to catch up to him to initiate the traffic stop. The three or four cars that were in front of me between my car and his car had to move to the right lane so I could initiate the traffic stop.

Q You said it was about half a mile and you pull him over?

A Yes.

Q Now, after you have him out of the vehicle at what point in time did you ask him to step from the vehicle?

A After I completed my checks and had the written warning prepared.

Q So your intention was just to get him back to the back of the car, I'm assuming?

A Yes.

Q And issue him a traffic citation for driving in the left lane?

A A warning.

Q And that's when the interaction kind of escalated, so to speak?

A Sure.

Q Was there ever any point in time when [14] you told him he was free to leave?

A No.

Q And, basically, the conversation continues because of the things that you noted in terms of his nervousness, not making eye contact, whatever other factors you had mentioned as you continued to question him?

A Yes.

Q Now, this is as a result of the training that you indicated you received in interdiction and things of that nature?

A Yes. I issued the warning and gave him back his documents. And that's when I followed up with questioning.

Q But never told him he was free to leave?

A No. That part of the traffic stop was done. The written warning part was done and I moved on to additional questions.

Q At any point in time did you indicate to him you believed there may be narcotics inside the car or anything like that?

A Yes.

Q Was that before or after he admitted to you that he had smoked marijuana.

[15]

A I'm not 100 percent sure. I want to say before, but I'm not 100 percent on that.

Q And whenever Trooper Martin—I believe it was your testimony and I certainly don't want you to testify for Trooper Martin—but I think it was your investigation at that point in time he also began to feel that Mr. Byrd was acting a bit too nervously and wanted to handcuff him?

A More than the general public, yes.

Q And I'm assuming that was for officer safety purposes?

A Detained not arrested, yes.

Q And Trooper Martin specifically told him that he was not under arrest?

A Correct.

Q And that's when Mr. Byrd runs off?

A He smiled and ran.

Q Now, whenever it comes time where you guys are talking about any drugs that might exist inside the vehicle or Mr. Byrd's personal use of any drugs, you had said that you had a discussion about consent to search?

A Correct.

Q And I believe it was your terminology that you said he kind of went back and forth in [16] order to give you consent to search the vehicle?

A He said yes and then he said that he would get it and then he asked why we wanted to search and he did say that. He did give consent to search the car.

Q At any point in time did you tell him that he did not have to consent to a search of the vehicle?

A I can't honestly answer that. I don't know.

Q And within the criminal investigation division of the state police do you guys have any written consent forms for people to fill out?

A Yes.

Q Did you have any with you that day?

A Yes.

Q Did you have him complete that?

A I'm not 100 percent. I want to say no.

Q And, incidentally, do you have any type of video that you were using?

A Yes.

Q And was it activated?

A Yes. It's downloaded.

Q So it will be available for discovery?

[17]

A Yes.

Q Do you ever find anything?

A No.

Q And did you ever ask that guy seems a little wishy-washy on consent, maybe I should walk him through a more formal form, make sure he understands what he is doing?

A I may have actually explained to him that I didn't need his consent because he's an unauthorized driver of the vehicle. I may have explained to him I don't need his consent.

Q There weren't any efforts to contact the rental company or the person that was on the rental agreement?

A I'm not required to because it says no other driver permitted and it was a current contract.

Q I'm assuming, too, everything in order prior to the time that you were going to issue him a warning card and that's when you had established everything in terms of his identity, the warrant from New Jersey, all of that stuff had already been sort of ferreted out?

A Yes. And I explained to him the delay for the stop. It was a lengthy stop and part of [18] that was because of the identification purposes and the warrant.

MR. SHORE: Thank you. I have no further questions, Judge.

REDIRECT EXAMINATION

BY MR. CARDINALE:

Q When you were following Mr. Byrd, about how many miles was he traveling in the left lane that you noticed?

A Approximately 3 miles.

Q And did he overtake any cars while in that lane?

A When he was behind the truck there were vehicles in the right lane being overtaken, yes.

MR. CARDINALE: Nothing further, Your Honor.

RECROSS EXAMINATION

BY MR. SHORE:

Q Just so I make sure I understand, even though he may have been in that left-hand lane for [19] a three-mile stretch that you witnessed, part of that three miles was a part of time when the tractor-trailer was in front of him?

A Yes.

MR. SHORE: No further questions.

THE COURT: Any defense testimony?

MR. SHORE: No witnesses or evidence, just brief argument.

(Mr. Shore closed on behalf of the Defendant.)

(Mr. Cardinale closed on behalf of the Commonwealth.)

THE COURT: I'm going to hold both charges for court. Bail will remain the same on Mr. Byrd.

(The proceedings concluded at 4:17 p.m.)

CERTIFICATE

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me of the within proceedings and that this is a correct transcript of the same.

_____

Lisa Bruaw, Reporter
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA
HARRISBURG DIVISION

UNITED STATES OF AMERICA	CASE NO.
v.	
TERRENCE BYRD	1:14-CR-00321

TRANSCRIPT OF PROCEEDINGS
SUPPRESSION HEARING

Held before the
HONORABLE WILLIAM W. CALDWELL
June 16, 2015, commencing at 10:45 a.m.
Courtroom No. 3, Federal Building,
Harrisburg, Pennsylvania

APPEARANCES:

WILLIAM A. BEHE, ESQUIRE
United States Attorney's Office
228 Walnut Street, Suite 220
Harrisburg, PA 17108
For the United States

THOMAS A. THORNTON, ESQUIRE
Federal Public Defender
100 Chestnut Street, Suite 306
Harrisburg, PA 17101-2540
For the Defendant

Proceedings recorded by machine shorthand; transcript produced by computer aided transcription.

Wendy C. Yinger, RMR, CRR
Official Court Reporter
wendy_yinger@pamd.uscourts.gov

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[3]

MR. BEHE: Your Honor, this is the time and place set by the Court for a hearing on the Defendant's motion to suppress evidence in the matter of the United States of America versus Terrence Byrd, which is at this court's criminal docket number 14-321. The record should reflect Mr. Byrd is present in court with counsel, Mr. Thornton. We are prepared to proceed.

Initially though, the United States would like to raise with the Court the question of whether or not the Defendant is entitled to challenge the search of the vehicle in question. It is uncontested that when Mr. Byrd was stopped in his vehicle in September of last year, that he was driving a rental car. He was the only one in the car. He did not rent the car. The car was rented by somebody else. The rental agreement says that only the person who rents it, or a limited number of individuals, are permitted to operate that car.

And the United States Court of Appeals for the Third Circuit in United States versus Kennedy, which is at 638 Fed.3d 159, decided in 2011, concluded as follows: That the driver of a rental car whose name is not listed on the rental agreement generally lacks a legitimate expectation of privacy in the car. And the Court concluded that they join, along with a number of other circuits, in concluding that a lack of cognizable property interest in the rental vehicle and the accompanying right to exclude makes it unreasonable for an unauthorized [4] driver to expect privacy in the vehicle. We conclude that society

generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company.

And similarly in United States versus Mebrtatu, M-E-B-R-T-A-T-U, which was a case submitted to the Third Circuit, there was a holding following Kennedy, and concluding that the driver of a rental car who has been lent the car by the renter, but was not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car unless there exists extraordinary circumstances.

And in this case, there are no circumstances. The rental agreement, which we will now admit by stipulation as Government's Exhibit No. 1, shows the vehicle was rented by a Latasha Reed. She is the only one who signed the agreement. The agreement specifically states that, I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, co-employee, or person who appears at the time of the rental and signs an additional driver's fare. Driver must be at least 25 years of age. And warning, in capital letters, that unauthorized drivers of the vehicle may cause a violation of the rental agreement. The only one that signed it is Ms. Reed.

Based on those facts, we submit that the Defendant [5] has no expectation of privacy to challenge the search of this rental car that he did not rent, did not sign the agreement, and was the only one

in the car. The person that rented it wasn't even there.

THE COURT: Mr. Thornton.

MR. THORNTON: Yes, Your Honor, I'd like to respond to that, but if you could just give me one minute to go out in the hallway? Mr. Byrd's family is down at the metal detector. They didn't let them up. If I could just tell the marshal in the hallway to let the family up, if you give me one second?

THE COURT: All right, sure.

(Complied.)

THE COURT: This matter that you've raised, Mr. Behe, was it raised prior to this hearing?

MR. BEHE: No, Your Honor. When we were researching and preparing for the hearing, we were looking at the documents and realized that he had not signed the rental agreement.

THE COURT: Okay. Very well. This is not something I can rule on, I don't think, in court right now. I probably have to handle it with the rest of the proceeding. That would be dispositive of the whole thing?

MR. BEHE: It would.

THE COURT: Well, I wish I had an opportunity to consider this before this moment.

MR. THORNTON: Your Honor, to that end, we also did [6] not—we received this information this morning. We have a defense—I don't know if defense is the right word—but the rental agreement itself says specifically that the—Your Honor, I was just going to bring up what has been marked as Government's Exhibit No. 1, I believe.

MR. BEHE: I already gave the Court.

MR. THORNTON: Oh, the Court has it? Okay, I'm sorry. Your Honor, in the paragraph that Mr. Behe read, it indicated the only ones permitted to drive the vehicle other than the renter are the renter's spouse. This vehicle was rented by Mr. Byrd's spouse, Your Honor. She is a common law spouse, but they have five children together and they've been together for 25 years. She rented this vehicle —

THE DEFENDANT: 17 years.

MR. THORNTON: 17 years, I'm sorry. She rented this vehicle, and she was actually using his car while he was using her car to make the trip to Pittsburgh.

THE COURT: Okay. Well, this is something that I'm going to have to decide in disposing of the case.

MR. THORNTON: Right. We don't have her here because we weren't aware this would be an issue. So if Your Honor wanted to continue this hearing, we can bring her in for a continuation of this, and then we can settle this issue.

THE COURT: Well, maybe you and Mr. Behe can stipulate about this. But if you can't, we can bring her in [7] later. I don't think I want to just continue the hearing at this late stage.

MR. THORNTON: I don't know if Mr. Behe is willing to stipulate. I think you want her here?

MR. BEHE: I would seeing as how somebody other than his common law wife showed up at the bail hearing to be a third party custodian. He told the police he was going to see his girlfriend in Pittsburgh. I can't stipulate.

THE COURT: I can't get into that right now. That could be maybe part of the briefing. All right.

MR. THORNTON: Your Honor, then we have filed a motion to suppress, and it's the Government's burden, I believe.

MR. BEHE: Yes. We call Trooper Long.

DAVID LONG, GOVERNMENT'S WITNESS, SWORN

COURTROOM DEPUTY: Would you state your name, please?

THE WITNESS: Trooper David Long.

COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MR. BEHE:

Q. Good morning.

A. Good morning.

Q. Would you tell us, please, by whom you're employed?

A. Pennsylvania State Police.

Q. How long have you been with the Pennsylvania State Police?

[8]

A. Nine years.

Q. And what role do you play with the state police? What is your job?

A. Currently assigned to the Bureau of Criminal Investigation, Shield Unit.

MR. THORNTON: I'm sorry, Your Honor. The Court security officers—oh, okay. They let the family up. I wasn't sure. I'm sorry.

BY MR. BEHE:

Q. Could you again repeat what your current assignment is?

A. Bureau of Criminal Investigation, Shield Unit. We do criminal interdiction on the highways.

Q. What does that mean?

A. We look for illegal activity moving up and down the interstate in Pennsylvania.

Q. Where do you work out of?

A. My office is stationed in Harrisburg, but we cover 26 counties here in the central district.

Q. When you work, are you in uniform?

A. Uniform, yes.

Q. Are you in a marked vehicle?

A. I patrol in an unmarked vehicle.

Q. Do you work alone?

A. No, I have a partner.

Q. Directing your attention to September 17th of last year, [9] 2014, which I believe was a Wednesday, were you working that day?

A. Yes.

Q. As part of your duties that you described?

A. Yes.

Q. Were you working with someone?

A. Yes, my partner was out. We were not in the same vehicle, but we were both out.

Q. Who was your partner that day?

A. Trooper Travis Martin.

Q. Directing your attention to approximately, I believe it was around 6, 6:30 that evening, where were you located?

A. I was stationary on Interstate—the center median of Interstate 81 at approximately mile marker 78.

Q. And where would that be? To give us an idea, pick an exit?

A. North of Exit 77.

THE COURT: I don't know about the exit numbers.

BY MR. BEHE:

Q. Is that near Linglestown? Is it Grantville? Where would it be? You're heading towards?

A. It would be the Hershey exit, State Route 39.

Q. And you were watching traffic that would be facing in the direction of Harrisburg?

A. Yes, correct, southbound traffic.

[10]

Q. The next exit would probably be the Linglestown exit?

A. No, the next exit would be the Hershey exit.

Q. The Hershey exit?

A. Followed by the Linglestown exit.

Q. You're watching traffic that's heading in the direction of Harrisburg, correct?

A. Correct.

Q. When you say you're sitting in the center median, what is that area like?

A. There's a cutout area, it's for emergency vehicles only.

Q. And you were in an unmarked vehicle?

A. Correct.

Q. Describe—well, where was your partner, Trooper Martin?

A. He was further south. I believe he was sitting at mile marker 75. So he was actually between the Hershey exit and the Linglestown exit.

Q. Was he in an unmarked unit as well?

A. He was in a marked unit.

Q. Tell us what happened then as you're sitting there?

A. I was observing traffic, southbound traffic. At that time there was a group of cars coming by. I observed a gray rental vehicle pass my location. The driver of the vehicle was not visible. His hands were

approximately 10 and 2, and he was pushed back, so he would be sitting behind the middle pillar of your vehicle. We call it the B pillar. So if you were facing [11] a car sideways, you would not be able to see any occupants right through the window.

Q. So this car was passing you heading in the direction of Harrisburg?

A. Correct.

Q. And you were able to determine as it goes by you that it's a rental vehicle?

A. Yes.

Q. How do you do that?

A. Rental companies put what they call bar code in the back comers of the windows. So when the person rents the vehicle, it's their exit, they get scanned before they leave the rental company.

Q. So you observed that on this car?

A. Yes.

Q. And you described the driver's hands as appearing to be in 10 and 2. Do you mean if you were looking at a clock, where 10:00 is and 2:00 is?

A. Yes.

Q. And that you couldn't see the occupant because of the way they were sitting in the seat?

A. Yes, they were sitting way back.

Q. None of those is a violation of the Motor Vehicle Code, correct?

A. No.

[12]

Q. But what did you do after you observed this?

A. It drew my attention. So at that point, I pulled from my stationary location and I began to follow the vehicle.

Q. Now were there other vehicles in the same lane as the vehicle you were attempting to follow?

A. Yes.

Q. Which lane was that?

A. Left lane.

Q. And describe for us what happens as you are trying to catch up to the vehicle that caught your attention?

A. As I continue to approach, and we continue southbound, vehicles who previously observed me start to get out of the way. They changed from the left lane to the right lane to continue the path. We continue for several periods, mile markers. I don't know the exact. I'm guessing roughly a half mile to a mile, maybe two miles. Vehicles continue to get to the

left lane—or get to the right lane, excuse me, change to the right lane.

Q. Is that what they're supposed to do?

A. Yes. There was a truck that was leading—there was two trucks that were in the left lane currently. The first truck switches over to the right lane. And as we're approaching mile marker 75 where my partner is sitting with his marked unit, the other truck changes over to the right lane.

Q. But what about the rental car that you're following?

[13]

A. At that point, the rental car is now the lead vehicle in the left lane of travel.

Q. Did it make any attempt to get over?

A. No, he did not. There was a period between the two trucks where he was to change over to the right lane and continue down south until—continue southbound until preparing to overtake the truck further down.

Q. So you're saying the car stayed in the left lane longer than it was supposed to when it had an opportunity to get over to the right lane like it's supposed to?

A. Correct.

Q. Was there any entrance ramp that would have prevented this car from getting over in the right lane where traffic would be getting onto the interstate that he would have an explanation that he couldn't get over safely?

A. No.

Q. And how far do you think the car stayed in the lead position without getting over in the left lane?

A. Between the—I estimate the distance between the two trucks was approximately two-tenths of a mile.

Q. Is this a violation of the Pennsylvania Motor Vehicle Code?

A. Yes.

Q. What is the violation in question?

A. 3313(d)(1).

[14]

Q. What does it prohibit?

A. Traveling in the left lane on limited access highways.

Q. What does that specifically prohibit?

A. It means if you are traveling on a limited access highway, you're required to drive in the right lane unless actively overtaking another vehicle. There's

exceptions to it. One, you're in the process of overtaking a vehicle. Two, traveling at a speed greater than the other vehicles. Three, preparing to make a left-hand turn. And four, you're coming upon a ramp where someone would be coming on from the left-hand side—right-hand side, excuse me, coming right to left.

Q. In your view, there was a point in time where the vehicle should have gotten over behind the one truck that moved into the right lane?

A. Yes.

Q. But continued on in the left lane?

A. Correct.

Q. And eventually was pulled over by you, correct?

A. Correct.

Q. What was your intention when you pulled him over with regards to citing or warning?

A. Issuing a warning.

Q. What's that?

A. It's just a notification that the individual was stopped. There's no points, no penalties, just a state police record [15] that we did stop you.

Q. And once you pulled the vehicle over, what happens?

A. The first thing I observed was extreme nervousness from the operator.

Q. I guess that means you approached the vehicle?

A. Yeah, I approached the vehicle from the passenger side.

Q. Why do you go to up to the passenger side?

A. Just safer for our purposes. If the vehicle—if my patrol vehicle is struck, I'll have time to get out of the way instead of being—I will jump out of traffic instead of driver side jumping into traffic.

Q. So you approached the driver's side—the passenger's side, correct?

A. Correct.

Q. Was there anybody else—how many people were in the vehicle?

A. One occupant.

Q. Do you see the occupant in court today?

A. Yes, he's Mr. Byrd in the red jumpsuit.

Q. Again, go back to what you first observed about the driver?

A. Extreme nervousness. Well, first I approached the vehicle and I noticed his hands were shaking. I identified myself, explained the reason for the stop. At that point Mr. Byrd, you know, argued with me a

little bit or questioned his violation and [16] explained that the truck, that he was trying to pass the other truck. And we went back and forth.

And then he asked me if I was going to give him a ticket, and I asked him if he wanted a ticket, and he said, no, because I wasn't going to give him a ticket. At that point I requested a driver's license. I asked for the rental agreement. And at that point he was unable to—he gave me the rental agreement. He stated that it was rented by—he was not the renter and a friend rented the vehicle. He provided me—

Q. Wait. Did he say his wife rented the vehicle or did he say a friend rented the vehicle?

A. No, a friend.

Q. What happens then?

A. He did not have his driver's license at the time. He handed me a piece of paper with a driver's number on it and a name and date of birth.

Q. Did he explain to you why he didn't have his driver's license?

A. I believe he said he washed it before the trip. It was in his wallet in the washer or something to that effect.

Q. So what do you do? Do you continue to observe this nervousness that you described?

A. Yes. He continues to fumble around through the car sporadically looking for, you know, different

items, for the rental agreement. He actually reaches at the center console [17] two or three times, but as soon as he puts his hand on it, he pulls away from it as if he didn't want to open it. He picked up a sweatshirt that was on the passenger floor two or three times going through the sweatshirt to see if the rental agreement was there. He kept insisting that his license was good, that the piece of paper was good for his license, that he did wash it. And he kept going back and forth with that.

Q. So what do you do then?

A. Eventually I—he does provide the rental agreement and I return to my patrol vehicle. I begin to run the information.

Q. Is that standard in a traffic stop, that you do checks like that, run the information, check criminal history, see if there's outstanding warrants, things of that sort?

A. Yes, every time.

Q. And what did you do here?

A. I begin to run the information, the name and date of birth, contact our intelligence center. Being that there was no picture—in Pennsylvania, when you run name, date of birth, and a driver's license, a Pennsylvania resident's photo will come up. If you're out-of-state, we have to contact our intelligence center who attempts to get the photo license from the outside state.

As we're sitting there, the sun continues to lower. We're in a bad location. Sun is pointed directly at us. So vehicles coming to our—coming south from our rear, in my opinion, are [18] having a hard time, you know, seeing us at our location. I get out of my vehicle. I return to the passenger side. And I asked Mr. Byrd to move his vehicle further south to a location where it would be safer.

Q. And did he do that?

A. Yes.

Q. So you allowed Mr. Byrd to have complete control of his car, to start it up, to re-enter Interstate 81, and travel now towards the Linglestown exit?

A. Yes.

Q. What did you do?

A. I followed behind.

Q. And then did he pull over again?

A. Yes.

Q. What happens after he pulls over and, I assume, you pull over as well?

A. Yes. I continue running information. The driver's license, I don't remember, I could not—I don't know if I found the license or not, but when running name and date, of birth, it came back to a different name.

Q. What do you mean by that?

A. I believe the name was James Carter from—the name and date of birth. It would be an alias. The Terrence Byrd came back to a—a Terrence T. Byrd came back to a James Carter with a different FBI number, they call it.

[19]

Q. So the Defendant gave you his name and date of birth. You run it. And it comes back to somebody named James Carter?

A. The name and date of birth was on the card with the New York driver's license number that he gave.

Q. So he gives you a card, and it comes back when you run it to somebody who isn't Terrence Byrd, it says James Carter?

A. Yes.

Q. What does that—does that cause you any concern or raise any suspicions with you?

A. Yes, quite a few.

Q. What do you do at that point?

A. At that point my partner arrives on scene. We continue checks running different names. My partner actually reapproaches Mr. Byrd—

MR. THORNTON: Your Honor, at this point the partner is here in the courtroom. We would ask that he be sequestered.

THE COURT: Pardon me?

MR. THORNTON: The trooper is here in the courtroom. We'd ask he be sequestered at this point.

THE COURT: Oh, okay. All right. We'll ask him to leave.

(Complied.)

BY MR. BEHE:

Q. Your partner apparently had arrived on scene?

A. Yes.

[20]

Q. In his marked vehicle?

A. Yes.

Q. And you said he got in your car?

A. He stood outside my vehicle.

Q. What happens then?

A. We continued checks. I run the information through our PaCIC, our intelligence center, the name and date of birth, the New York OLN.

Q. What's an OLN?

A. Operator's license number, sorry. And at that point I—let me back up. With the James Carter, with the alias of Terrence Byrd, there was a violation warrant out of New Jersey. So from that information, Harrisburg dispatch is who we dispatch out through, the dispatcher contacts what they call the ORI, the originating agency. That's who enters the warrant.

They have to—the warrant was for a probation violation, and it was limited extradition. So even though Pennsylvania is a neighboring state, we were out of that extradition area. But that takes some time. He has to call the ORI and verify that we have this individual stopped, and do you want him, yes or no? And then we make arrangements from there.

Q. All right. So you pulled an individual over who's visibly nervous when you approached the car and discuss things with him?

[21]

A. Yes.

Q. He gives you identification and a date of birth on this piece of paper that is supposed to be his substitute driver's license from New York. And when you run that information, it comes back to a name completely different, a James Carter?

A. Yes.

Q. And when you run that, it turns out there was an arrest warrant for this James Carter out of New Jersey; correct?

A. Yes.

Q. Does all of this raise suspicion in your mind, you got an individual pulled over now who has an outstanding warrant for his arrest?

A. Yes.

Q. Did you run his criminal history to see if that caused you any concern?

A. Yes.

Q. What were some of the things that you determined from running his criminal history?

A. He had prior convictions or charges for weapons violations, assault on police, drug charges, assault charges, domestic charges.

Q. And when you were in the car, does your partner ever approach the vehicle?

A. Yes, on several different occasions.

Q. And why is that?

[22]

A. Confirm social security numbers, dates of birth, things of that nature.

Q. Now we've only been taking testimony here for maybe 15, 20 minutes. Was this taking considerably longer than that while you're sitting on the roadside to run all this information?

A. Yes, a lot longer.

Q. And what happens? What's the next thing that happens?

A. Eventually, we do confirm that Mr. Byrd is James Carter. It's one and the same person. At that point I have the warrant in hand. I have the rental agreement. I asked Mr. Byrd to step from the vehicle. I explained to him—I apologized that the stop took so long and that there was some confusion about who he really was.

Q. So you're actually apologizing to him because of the length of time that it took for you to verify that he has two names?

A. Yes. I told him why the delay took so long. And then I asked him about a previous arrest. And he said it was from way back in the day, he was arrested under that name, that's the name he gave, and his real name is Terrence Byrd.

Q. Did you tell him that there was an outstanding warrant for him in New Jersey?

A. Yes. I told him if he was—the warrant was valid through New Jersey, and if he was standing in New Jersey right now, he'd be going to jail.

[23]

Q. How is he acting at this point? Do you still observe this nervousness that you did before?

A. Yes. There's a nervous laughter, as I call it. He's not able to stand still. He's dancing back and forth, pacing back and forth a little bit.

Q. And did you still have suspicion that something might be going on?

A. Yes.

Q. What did you do? Did you ask him any questions at that point?

A. I asked him if there was anything illegal in the vehicle, and I asked him for consent to search the vehicle.

Q. Did he mention if he had used any controlled substances?

A. He stated that there was a blunt in the vehicle and offered to get it for us.

Q. What's a blunt?

A. Smoked marijuana cigarette.

Q. Do you recall if he said that he had smoked it?

A. I don't recall. His tongue was green, so that's an indicator that he had smoked it. There was no odor though.

Q. Are you permitted to possess marijuana in Pennsylvania?

A. No.

Q. Does that give you probable cause to search the vehicle in and of itself?

A. Yes.

[24]

Q. And as you're asking him for consent, does he eventually consent to the search of the vehicle?

A. Yes. He asked—he asked us back several times, do you want to search my vehicle, you want to search the vehicle? Then he offered to get the blunt. And then he said, yeah, you can search the vehicle.

Q. When he offered to get back in his own car and retrieve the blunt, did you let him do that?

A. No, absolutely not.

Q. So once you get consent, what takes place then?

A. I start to—my partner stands outside with Mr. Byrd on the right side of the vehicle, and I begin my search on the driver's side area. While I'm searching the area, the driver's side part of the car, Mr. Byrd is talking with my partner and admits to cocaine usage. Mr. Byrd was extremely nervous at this point as he's actually walking back and forth beside the car and actually walking towards the car on several times when my partner tells him to stand back, stand back. At one point, he actually kneels down on the side of the road. He's kneeling on his knees.

Q. What kind of area was it?

A. A grassy area, right of the right shoulder. At that time an off-duty trooper just happens to stop. Trooper Swope. He's just standing. He's in plain clothes. He's not on duty. He's just making sure we're okay. At that point he stands back to [25] the right, and Trooper Martin proceeds—we don't search alone. So there's two of us, and in this case we had a third person.

Trooper Martin advised me to pop the trunk, he was going to start the search in the trunk area. He popped the trunk. Mr. Byrd was still visible to us, and I could see that he was still in the process of rocking back and forth and kneeling down. I explained that something is not right here, that there's got to be something more than what he's telling us, that he snorted cocaine and the marijuana blunt.

Trooper Martin looks down. He's going through the trunk, and he finds Outlaws motorcycle gang colors and he finds a bulletproof vest. At that point Trooper Martin tells me that he's going to detain Mr. Byrd, he's going to put him in handcuffs. He's not under arrest at that point, but he's detained for the period of the stop. So Trooper Martin steps to the side of the vehicle and explains to Mr. Byrd, listen, you're not under arrest, but I'm going to detain you. At that point Mr. Byrd turns south and takes off running.

Q. All right. He actually just sprints away from you?

A. Yes.

Q. How many officers—how many troopers chase or join in the chase?

A. Three.

Q. Describe the chase for us, where you are headed and where [26] does Mr. Byrd run?

A. We continue south approximately a hundred yards. There's a roadside wood line fence that you can't see visible from the road. Mr. Byrd makes a hard right and climbs over the fence. Trooper Swope is first; he's in plain clothes, Trooper Martin, and then myself. We chase him up a slight embankment. And then Mr. Byrd makes a hard right back parallel to our vehicles but still in the wood line. It's actually somebody's back yard there. And there's another fence there.

Trooper Swope ordered Mr. Byrd to the ground. He was taken to the ground, taken into custody without incident. He admitted that there was heroin in the car. He was brought back to the vehicle. The items were retrieved from the vehicle. It was towed back to Harrisburg. Mr. Byrd was transported back to Harrisburg barracks. And that was the end of my interaction with Mr. Byrd.

Q. Did you observe the heroin in the trunk of the car when you were at the roadside?

A. Yes. It was in a black bag that—there was—the heroin was on dried rice in a gallon size bag Ziploc shut inside a black garbage bag.

Q. Prior to Mr. Byrd fleeing from the scene of the stop, did he make any statements, if you can recall, to you or Trooper Martin about fighting with you or getting into any sort of fight with the police?

[27]

A. No. It was—there was no tension during the stop. It was a cordial conversation.

Q. Did you tell him anything at all about the rental agreement and whether he was allowed to be operating the vehicle?

A. Yes. That was at the time of issuing the warning, I advised him that he was not authorized to actually drive the vehicle because he was not on the rental agreement.

Q. At any time did he tell you, my wife rented this vehicle for me?

A. I don't believe so, no.

Q. When he was in the car, did you observe him use his phone at all?

A. Not with my interaction to him, no.

Q. Did you issue him a warning?

A. Yes.

Q. What was the warning for?

A. Traveling in the left lane.

MR. BEHE: That's all I have.

THE COURT: Okay.

MR. THORNTON: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. THORNTON:

Q. You indicated just now that you're not really sure whether he told you that his wife rented the vehicle for him, are you?

[28]

A. I can't say a hundred percent.

Q. And you just told us that he wasn't using the telephone when he was in the car?

A. Not with me.

Q. Not with you? You mean, not while you were talking to him?

A. Yes.

Q. And you only went up to the car the original time after it was pulled over?

A. Twice.

Q. And the second time was afterwards when you got him out?

A. Yes. No, third time is when I got him out.

Q. Okay. Let's go back to the beginning of this whole thing, if we could. What time was it when you were sitting there and you observed this car go by?

A. I'm not sure of the exact time.

MR. THORNTON: Could I approach the witness, Your Honor?

THE COURT: Sure.

BY MR. THORNTON:

Q. I'd like to show you—I will leave you with a whole pile of exhibits.

MR. THORNTON: Your Honor, I believe we provided the exhibits to the Court.

THE COURT: Yeah, we have them.

[29]

BY MR. THORNTON:

Q. I'd like you to look at this Exhibit No. 7, if you could. Is that your police report?

A. Yes.

Q. What time does it say on there?

A. 18:10 hours.

Q. So that would be 6:10 p.m., correct?

A. Yes.

Q. So this stop began, you pulled out at 6:10 p.m.?

A. Approximately.

Q. Within that minute, right? Are you saying it was really 6:13 or 6:14?

A. I don't know the exact time. I didn't look at my watch exactly when I pulled out.

Q. Where does that 6:10 come from? You put that on there, didn't you? Are you saying that's inaccurate?

A. No, it's approximate. I don't know.

Q. So you're sitting there alongside the highway. On the right-hand side of the highway or the left-hand side of the highway?

THE COURT: In the center.

BY MR. THORNTON:

Q. In the center lane, in the median between?

A. Yes.

Q. In the median when you are sitting there, the car goes by, [30] and you see a person sitting in the car with his hands at 10 and 2 on the steering wheel, and you pulled out to follow him; right?

A. No.

Q. You did not?

A. I don't see a person in the car.

Q. You didn't—so you thought there was no one in the car?

A. I can't see the person in the car.

Q. I'd like to have you look at what is marked as Defendant's Exhibit No. 3. Now is that a picture of the type of vehicle that he was driving?

A. Actually, I believe this is a newer model of it.

Q. Wasn't it a 2014 Ford Fusion? Isn't that what it says in your police report?

A. Yes.

Q. So actually, that is the car; correct?

A. Yes.

Q. So when you said you didn't think it was the car, you were incorrect; right?

A. Correct.

Q. That car, the 2014 Ford Fusion, when a person is sitting in the car, and they're driving up towards you, you must have been able to see him initially when he was driving towards you; right? When he's coming up the highway, you must have been able to see in the front of the car and see there was a person [31] sitting in there; right?

A. I don't know. He was in a row of traffic.

Q. So you don't know if you looked to see if there was anybody in there?

A. There was five or six cars in the line. I don't know that I specifically saw Mr. Byrd, no.

Q. How many of the other cars were the people sitting back towards the back?

A. I can't answer that.

Q. Because you didn't look at them?

A. Because I don't recall. I don't know.

Q. So—well, at any rate, we'll keep on there. I'd also like to ask you to look at Defendant's Exhibit Nos. 1 and 2, if you could. Would you agree with me that 1 is a photocopy of a Microsoft map of 81, is that correct?

A. Correct.

Q. And on that map, I personally have written in a couple of numbers, the 75.4. Now is that where you were sitting?

A. No.

Q. Where were you sitting exactly?

A. Closer to your 77. Actually north of that, north of 39.

Q. Where you pulled him over, was it 75.4 originally?

A. No. I originally pulled him over at—

Q. Go ahead.

A. —south of 75.4, right at that curve, past the curve.

[32]

Q. Can I ask you to look at the police report, which is Exhibit No. 7, not on the cover page, but the second page which I wrote a 1 on. It says there in—it has a list of numbers, it goes down to number 12. And number 12, it says you were performing patrol duties on Interstate 81 at mile marker 75.4?

A. That's where the violation occurred.

Q. Which violation is that?

A. Traveling in the left lane.

Q. So is that the exact spot where he was passing the car—passing the truck?

A. That's where he was not passing the vehicle. That's where he was traveling in the left lane not overtaking anybody.

Q. In between two trucks?

A. In between two trucks in the right lane.

Q. And what you wanted him to do at that point was go in between two trucks on Route 81?

A. There's a period there. There's a space that he's required to change lanes.

Q. We'll see the video in a second. So you pulled—when you say—when your report says you were performing patrol duties on Interstate 81 at 75.4, that's not where you were sitting?

A. That's not where I was sitting, no.

Q. Now if you look down there a couple sentences later, it says, I was traveling in the left lane, and XXX vehicles in [33] front of my patrol vehicle was a gray in color Ford Fusion traveling in the left lane. The gray vehicle traveled in the left lane for approximately two miles without overtaking another vehicle. I was directly behind the gray Ford at mile marker 73.8 and initiated the stop. Now is that correct?

A. Well, the miles is off. It wasn't two miles. It could be a typo. Two-tenths of a mile. But it's approximate. I didn't clock it exactly.

Q. So the two miles that's written in your police report is inaccurate, is that correct?

A. Yes, that's inaccurate.

Q. And you wrote this report, right?

A. Yes.

Q. When that car came by, you had no prior warning to look for that vehicle? No one—you weren't part of any interdiction effort or anyone else who told you to be looking for that vehicle?

A. No, sir.

Q. So the only reason you pulled out was the fact that he was at 10 and 2 and you couldn't see him?

A. In a rental vehicle, that's what drew my attention to it, yes.

Q. Absolutely none of those things are illegal?

A. Absolutely not.

Q. So you're following him just because you want to follow [34] him?

A. Yes.

Q. Now at that time, 6:10 in the evening, I assume that you have spent a fair amount of time on 81 and you understand that 6:10 in the evening is rush hour; right?

A. Correct.

Q. And there's very very heavy traffic on Route 81 during rush hour, isn't there?

A. Sure.

Q. Sometimes it even comes to a complete stop on Route 81, doesn't it?

A. At times, yes.

Q. On this date, there was heavy traffic out there, wasn't there?

A. Yes.

Q. And it's a very congested area?

A. Yes.

Q. So at 6:10 p.m., you see a group of cars go by you?

A. Correct.

Q. You and Trooper Martin work as a team?

A. Yes.

Q. Have you worked as a team for a while?

A. Yes.

Q. How long?

A. Over a year.

[35]

Q. When you were sitting in the median strip, were you behind any bushes? Was anything obstructing anybody's view of you?

A. No.

Q. Did you have—was your view obstructed in either direction for any period?

A. No. Obstructed from what?

Q. From seeing the cars in front? Was there a bush—

A. No, no, no.

Q. So you're easily visible sitting in the middle lane?

A. Yes.

Q. Or sitting in the median strip, I'm sorry?

A. Yes.

Q. When that automobile goes by, I'm sure you don't know exactly what speed it was going?

A. No idea.

Q. Now normally if a car is going—well, let me ask you this first. What is the speed limit at that area?

A. 65 miles per hour.

Q. So at 65 miles per hour, how many feet does a car travel per second?

A. I don't know. I don't have the math in front of me.

Q. You don't have a map?

A. Math. I don't have the math in front of me.

Q. I can give you the math, and I've got a calculator right here. At 65 miles an hour, is a car travel approximately 95.3 [36] feet per second?

A. Approximate.

Q. So that in front of you, you're able to view this car, it's moving at 65 miles an hour, it's moving almost a hundred feet per second? So your view of this car was just instantaneous, you didn't have a long time to look, did you?

A. No.

Q. Now in your police report, which is marked as Defendant's Exhibit No. 7, at the top of the second page past the cover page, the first page past the cover page, it says, reason for stop, traveling in the left lane. Is that the whole reason for the stop?

A. Yes.

Q. So he did absolutely nothing else wrong up to that point, did he?

A. No.

Q. When you pulled out, there were how many cars between you and Mr. Byrd?

A. I don't know the exact number.

Q. When you pulled out, there were two trucks in the right-hand lane, and Mr. Byrd was the lead car in front of four to five automobiles; is that right?

A. Ask me that again.

Q. All right. When you pulled out—I will ask you in a two-part question. In the right lane, when you pulled out, [37] there were two trucks; is that correct?

A. In the right lane?

Q. In the right lane?

A. I don't know. I don't know what was in the right lane when I pulled out.

Q. So when you pulled out, you pulled behind a line of cars; correct?

A. Correct.

Q. What was next to that line of cars? You had to pass those people.

A. I don't know what type of vehicles those were. There were vehicles there, but I don't know if they were trucks or cars.

Q. Was that line of cars that you pulled behind—well, let me ask it differently. When you pulled out, you pulled into the left lane; correct?

A. Correct.

Q. And you got behind that line of cars, right?

A. Right.

Q. That line of cars then passed vehicles that were in the right lane, correct?

A. Correct.

Q. At the beginning of that line of cars was not Mr. Byrd, but was a truck?

A. Correct.

Q. All those cars were behind that truck?

[38]

A. Correct.

Q. Including Mr. Byrd?

A. Correct.

Q. How fast were you going?

A. No idea.

Q. Not exceeding the speed limit?

A. No.

Q. All those—

A. Me or Mr. Byrd?

Q. Well, you're directly behind that line of traffic. No one is exceeding the speed limit, right?

A. Yeah, no.

Q. Is everybody below the speed limit? At the speed limit? Where are they?

A. I'm not a hundred—minimum, at it. I think below it, maybe potentially.

Q. Is that unusual on Route 81 if the traffic would be going below the speed limit at times during rush hour?

A. That's usual when they observe me sitting in the center median.

Q. It's also usual on a regular basis just because traffic bunches up, isn't it?

A. I can't say every day.

Q. When you pulled out then, you're behind a number of cars, you're not sure how many, there's a truck in the front of Mr. [39] Byrd, and then Mr. Byrd is behind the truck, and then the cars are between you and Mr. Byrd; is that right?

A. Yes.

Q. And when you pull out, it is approximately 6, I'm guessing, 6:11 p.m.

MR. THORNTON: Your Honor, we'd like to show the video at this point, if we could.

THE COURT: All right.

(Video begins.)

BY MR. THORNTON:

Q. And if we could just keep it right there at the very beginning before we start. I'd ask you to look. We have this video on a different player than was provided by the Pennsylvania State Police. But I

think you'll find, if you look at Exhibit No. 4, Defendant's Exhibit No. 4, if you look at Defendant's Exhibit No. 4 and look at the screen in front of you, can you tell me if that is pretty much the exact time that the screen is showing.

A. Of?

Q. If you look at 4, if you take Defendant's Exhibit No. 4 and look at it, it says on top of Defendant's Exhibit No. 4 that the time is 18:11:11, which would be 6:11 p.m. and 11 seconds; correct?

A. Correct.

Q. If you look at the screen in front of you, would you agree [40] with me that the screen is depicting 6:11 or within milliseconds there?

A. Correct.

Q. And the reason why I'm asking you that is, you see on the bottom left of the screen down below the bar is a time. So this is when you have turned on the video in your police car, correct?

A. No.

Q. It's not?

A. No.

Q. When did you turn it on? This was the video that was provided to us at any rate.

A. The Pennsylvania State Police dash cam videos are constantly running.

Q. Oh, okay.

A. They do not save unless the record button is hit or the lights are activated. Once I activated my lights, the video goes back automatically 30 seconds. It will save from 30 seconds prior to me hitting my lights until I shut it off.

Q. Is that why when we turn this on, there's no audio for the first 30 seconds?

A. Correct.

Q. So when you actually turned it on is when the audio starts?

A. After the—it doesn't record—it can't record audio [41] for the previous 30 seconds.

Q. How did you turn it on? Did you turn on your lights?

A. There's a button on my steering wheel, yes.

Q. Did you turn on your lights on the recorder?

A. Not at this point, no.

Q. You turned it on 30 seconds from here?

A. Yes.

Q. Okay. So at the bottom there—at any rate, so you've been following Mr. Byrd here for a distance?

A. Correct.

Q. And there's only one vehicle now between you and him, correct?

A. Correct.

Q. And Mr. Byrd is in front of this vehicle here, correct?

A. Correct.

Q. Now isn't this vehicle doing the exact same thing that Mr. Byrd is doing? Isn't it staying in the left lane?

A. Yes.

Q. Why didn't you pull him over?

A. Mr. Byrd is the lead car.

Q. They're both doing the exact same thing though, right?

A. Mr. Byrd is the one holding up traffic right now.

Q. How fast were they going if they were holding up traffic?

A. The speed limit at best.

Q. So he's going the speed limit, but he's holding up [42] traffic?

A. He's allowed to increase his speed to overtake a vehicle.

Q. So you pulled him over because he wasn't speeding?

A. He's traveling in the left lane.

Q. We can play the video at this point, Your Honor.

A. The violation already occurred before this video.

(Video resumed playing.)

Q. Could we stop it there, please? The violation had already occurred?

A. The violation is not on this. The violation is between this truck and a truck that is behind him.

Q. Now those trucks—this was the truck that was in front of Mr. Byrd at the time the violation occurred then; right?

A. No.

Q. That truck was in the left lane, wasn't it?

A. Both trucks were in the left lane at some point.

Q. Okay. Let's go back to the map, if we could. If we can go to Defendant's Exhibit No. 2. Now the distance—I'm sorry. Defendant's Exhibit No. 1. And

it's your testimony that both those trucks were in the left lane?

A. One of them definitely was. I can't say both of them.

Q. Didn't you just say a minute ago that both of them were in?

A. Well, I mean, I can't say a hundred percent certain.

Q. Well, we are kind of under oath here, and it would be [43] helpful that if you're not certain—

A. I can't recall. I don't know, so I can't answer that.

Q. A minute ago, you said they definitely were, and now you can't recall. So now we're at—if we look at Defendant's Exhibit No. 1, if you could tell us where exactly the violation occurred? If you pulled him over at 75.4, right?

A. No, I didn't pull him over at 75.4.

Q. That's what you said in your police report—oh, I'm sorry. You were behind him at 73.8?

A. 73.8.

Q. And pulled him over. So you were behind from him 75.4 to 73.8, is that correct?

A. I was behind him from 77 to 73.8.

Q. During that time, you can't recall what trucks were in the right lane or what trucks were in the left lane?

A. As you stated earlier, it's heavy traffic congested.

Q. So the distance you would have followed him from 77, you would have first had to pull in behind that line of traffic?

A. Correct.

Q. You had to make all the cars in front of you move? How many cars moved out of the way?

A. I don't have the total number.

Q. Would you agree it was four to five vehicles in the left lane?

A. I can't a hundred percent say, so I don't want to answer.

[44]

Q. If you could look at Defendant's Exhibit No. 9, which is the preliminary hearing transcript in this matter. Would you agree that on page 4, lines 18 and 19, the vehicle was approximately four or five vehicles traveling in the left lane in front of you. Would you agree that's accurate?

A. Yes. It says, approximately.

Q. And that was under oath at the preliminary hearing, correct?

A. Yes.

Q. And you would agree that Mr. Byrd was behind the truck, correct?

A. Yes.

Q. So the truck was the one that was holding up the traffic at that point, wasn't it?

A. And got back over.

Q. And as soon as the truck got back over, Mr. Byrd passed that truck and got in front of it, didn't he?

A. Actually, both of them.

Q. Passed both trucks and got in front of them?

A. As I said earlier, the violation occurred between this truck and another truck back at 75.4. He should have changed lanes to get from the left lane to the right lane. Mr. Byrd is the lead vehicle from just before 75.4 to 73.8.

Q. So you're saying that truck that's in front of him moved over at 75.4, and then he stayed in the left lane all the way [45] from 75.4 to 73.8?

A. Yes.

Q. Is that your testimony?

A. Yes.

Q. And what you're saying Mr. Byrd should have done is, as soon as that truck that was in front of him moved over, he should have gotten behind that truck? He shouldn't have passed that truck even if he wasn't going over the speed limit?

A. This truck or the previous truck?

Q. The truck that's in front of him?

MR. BEHE: That didn't answer the witness's question.

BY MR. THORNTON:

Q. The truck that's on the screen right now?

A. He does the correct thing after this truck. The violation already occurred.

Q. But you would have had him go in between the two trucks is what you're saying?

A. As he's supposed to.

Q. If he's going the speed limit and he is passing the trucks, shouldn't he stay in the left lane?

A. No. You're required to drive in the right lane unless you're overtaking somebody.

Q. Wasn't he overtaking somebody?

A. He already overtook that truck. Then he changes lanes again to overtake this truck. He's supposed to change lanes to [46] overtake this truck.

Q. You would have had him go in and back out rather than pass the two trucks?

A. That's what you're required to do. That's why the traffic is backed up.

Q. Which nobody else did either, right? I mean, this car in front of you didn't do it?

A. He's the lead vehicle.

Q. Mr. Byrd is the lead vehicle?

A. Right now, yes, he is.

(Video resumed playing.)

Q. And that's Mr. Byrd's car right there?

A. Correct.

Q. So immediately after he passed that truck, he got directly in the right lane, didn't he?

A. Yes.

Q. And there's no cars in front of him?

A. No.

Q. How fast was that truck going?

A. I don't know.

Q. Well below the speed limit?

A. I can't say for sure.

Q. It would have to be well below the speed limit, wouldn't it, because Mr. Byrd was doing at best the speed limit, and when he went by the truck, he went by easily, didn't he?

[47]

A. He was below the speed limit, but there was also Trooper Martin in the marked unit sitting in the center median, so all traffic was slowing.

Q. But he—if—

A. Traffic always slows down when they see—

Q. I'm not worried about the police officer, I'm worried about the truck in the right-hand lane.

MR. BEHE: He's trying to answer the question, Your Honor. I think Mr. Thornton should let him answer.

THE COURT: I think you are interrupting.

MR. THORNTON: I'm sorry.

THE WITNESS: The truck is going below the speed limit because traffic slows down when there's a police officer sitting in the center median. So the truck is slowing down because he sees a police officer.

BY MR. THORNTON:

Q. You don't know that, do you?

A. It's—

THE COURT: Well, it's his practice, as I understand it, or it's his observation.

BY MR. THORNTON:

Q. So if that truck is in the right-hand lane going 45 miles an hour, Mr. Byrd is going 65, he's supposed to get out of the left lane and get behind that truck that's determined to be doing 45, get back out of the right lane, and then pass the [48] truck is that what you're saying?

A. That's what the Vehicle Code writes.

Q. So every time that you pass a car, you have to immediately get over to the right?

A. That's what the Vehicle Code writes, yes.

Q. Even if that car in front of you is going below the speed limit and causing a danger?

A. Then you overtake him again.

Q. Then what Mr. Byrd did was correct, wasn't it?

A. No. Mr. Byrd should have changed from the right lane. If he was approaching the vehicle, he should have changed back to the left lane, overtook the truck, and then he did the correct thing.

Q. How many cars were behind you?

A. I have no idea.

Q. All the cars that you had passed and forced to move over?

A. I didn't force anybody to move over. Most people change from the left to right lane when they see a police officer pull out.

Q. All the cars that you passed, were they then behind you?

A. I can't say—they were behind me, but I don't know if they were in the left or right lane.

(Video resumed playing.)

MR. BEHE: Your Honor, I don't know if any of the family members are going to be witnesses. If they are, I'd ask [49] that they wait outside.

MR. THORNTON: No, no.

MR. BEHE: Nobody is going to be one? Okay. Thank you. Sorry to interrupt.

BY MR. THORNTON:

Q. While we've got it stopped here, did you see those cars that moved over because you were behind them pass you then?

A. Yes.

Q. And they were all directly behind you, right?

A. Along with the second truck. The truck that Mr. Byrd passed continued in the right lane because he could not get over. But the second truck is in the left lane, as you see right now.

Q. Right. And he got over because you were pulling him over, right?

A. Yes.

Q. And the second truck couldn't get over?

A. Because there were other cars in line.

Q. So those cars would have impeded anyone who would have tried to do what you wanted them to do, which is go in between two trucks and then come back out? If you went in between the two, you would have to wait for that entire lane of traffic to go by, wouldn't you?

A. I don't understand what you're asking me there.

Q. What you said earlier was, Mr. Byrd, after he passed the [50] first truck, should have gotten in between that truck and the truck in front of it; correct?

A. Correct.

Q. And then all those cars that were behind Mr. Byrd, including you and all the cars that are behind you, would have kept Mr. Byrd from being able to get out and get around those trucks?

A. Those cars did exactly what they were supposed to do as I got past them. They changed in the right lane. I passed. They got back out. That's what you were supposed to do.

Q. Even the truck in front of you is going slower than the speed limit?

A. There was a distance between there that he should have got over and he didn't get over.

Q. Even though both lanes—like right here, as we watch here, there's cars in both lanes continuously on 81 during rush hour? And all those cars are to continue moving back and forth from lane to lane? Isn't that dangerous?

A. Not any more dangerous than the person traveling in the left lane going the speed limit or below and traffic backs up the whole way. As you see, he could have gotten back over because the first truck that was in between the two trucks made it to the left lane. So obviously, there was a period he could have got from the right to the left lane. That truck did it.

Q. And probably because you had your lights on and you had [51] made everybody slow down to move over. But you're saying here that someone who is going the speed limit can get stopped? Is that what you're saying? They are being stopped for not exceeding the speed limit?

A. For driving too—if they're causing a hazard.

Q. What was the hazard?

A. If you're slowing up traffic that much that it's backing up, that's a traffic hazard.

Q. But if you're going 65, if you're doing the speed limit, you can't be causing a traffic hazard, can you?

A. If traffic is backing up behind you continuously, it can be a traffic hazard, yes.

Q. So you're supposed to speed so you can let other people speed?

A. You can accelerate to overtake the vehicle. I'm not saying he should speed and stay in the left lane and speed. He can speed to overtake a vehicle. We have to give 6 miles per hour over the posted speed limit, so he's allowed to travel that to overtake another vehicle.

Q. He can, but there's no requirement that you speed, is there?

A. No.

Q. I mean, the Pennsylvania State Police doesn't require people to speed, do they?

A. No.

[52]

(Video resumed playing.)

Q. So there Mr. Byrd just told you, I was doing the speed limit, and you told him he should have been speeding; right?

MR. BEHE: Objection. It said right on the tape what he told him. I mean, he said, you can speed up to pass.

BY MR. THORNTON:

Q. In your—if we could look at Defendant's Exhibit No. 7, the police report that we were previously looking at, in that police report you indicated that he was in the left lane there for over two miles. But then you told us that that is actually incorrect, right?

A. I told you it was an error, yes.

Q. So you are saying that if he was holding up traffic, it was for no more than two-tenths of a mile?

A. Two-tenths of a mile, yeah.

Q. At 65 miles an hour, two-tenths of a mile goes by in a couple of seconds, doesn't it?

A. Yes.

(Video resumed playing.)

Q. If we could go back to the two-tenths of a mile thing. You also testified at the preliminary hearing, which is Defendant's Exhibit No. 9. And on page 18, lines 24, 25, and onto 19, you were asked, Just to make sure I understand, even though he may have been in that left lane for a three-mile stretch that you witnessed, part of that three miles was part [53] of the time when the tractor-trailer was in front of you? And that answer was, Yes. So at the preliminary hearing,

you said it was not two, but actually three miles; right?

A. Yes, from—yes.

Q. But all that is inaccurate, it's really two-tenths of a mile; correct?

A. I didn't say the violation committed in that two or three-mile period.

Q. So if we narrow it down, he was in the left lane for two-tenths of a mile?

A. The violation was in the two-tenths of a mile, yes.

Q. At 65 miles an hour. I noticed here that you're on the right-hand side of the car. You are on the safer side of the car. That's training, I assume?

A. Personal preference.

Q. And at this point, you're trying to get information from him, and he gives you what you called a piece of paper with a driver's license number on it; is that correct?

A. Correct.

Q. Is he about to hand that to you?

A. He does hand it to me after he finds it.

MR. THORNTON: Your Honor, I don't have copies of these, but I'd like to show you what's been

marked as Defendant's Exhibit Nos. 13 and 14. It's not in your pile, I'm sorry. I just marked them this morning.

[54]

BY MR. THORNTON;

Q. And ask you, is that the piece of paper, is 13 the piece of paper, what you called the piece of paper, that he gave you with his driver's license number on it?

A. Yes.

Q. Okay. And 14, just for informative purposes, is a copy of what it would look like if it hadn't been washed?

A. Correct.

Q. The thing that you described as a piece of paper was actually a form from the New York Department of Transportation, wasn't it? It's an interim license that they give out when somebody loses their license? It wasn't just like a piece of notebook paper, it was an official New York license; correct?

A. I don't know.

Q. Well, when you ran that number, it worked out and it came back to the right guy; right?

A. Correct.

(Video resumed playing.)

Q. Now at this point, he's looking through the car for that piece of paper, is that right, for the driver's license and for the rental agreement?

A. Yes.

(Video resumed playing.)

Q. So was Mr. Byrd looking for his wallet when he was looking around inside the car trying to find his wallet?

[55]

A. I don't know what he was looking for. I mean—I don't know—I can't say specifically it was his wallet.

(Video resumed playing.)

Q. So that noise means you're back inside your car?

A. Yes.

Q. And what are you doing there?

A. Typing in the information.

Q. And the information he gave you was?

A. From that New York—the name and date of birth.

Q. When you type that in, what actually comes back on the screen in front of you?

A. I don't remember what initially came back.

Q. I have two other documents which I've marked together as Defendant's Exhibit 12. Are these copies of what comes back on the screen when you type it?

A. Yes.

Q. Okay. So do you see that exact information?

A. Yes.

Q. Okay.

A. Not—

Q. Not in this form?

A. Actually, that form, but it depends if I'm running his name and date of birth for the driver's license check or for the criminal history. At first, it's for the driver's license check.

[56]

Q. Is one of these driver's license?

A. No.

Q. These are both criminal history?

A. Criminal histories, yes.

(Video resumed playing.)

Q. So now you're going to move from 73.8 down to where you're next to the bridge, right?

A. Past the bridge, yes. It's right at the Linglestown exit, the ramp to the Linglestown exit.

Q. At this point you're pulling him over for a left lane violation warning?

A. That's why I stopped him, yes.

Q. At this point you've been to the automobile and you've looked inside? You didn't see any drugs inside the automobile? You didn't see a blunt or anything like that, right?

A. No.

Q. There was nothing illegal in the automobile in plain view you had seen, correct?

A. Correct.

(Video resumed playing.)

Q. There's another voice there. Who's that?

A. Trooper Martin, my partner.

Q. Does he just come and get in the car?

A. He's standing outside the car.

Q. Okay. So at that point there, you just said, this is him. [57] So you've identified Mr. Byrd as Mr. Byrd there, didn't you?

A. No, because of the criminal history, you see it says, James Carter, or something Carter on there.

Q. But you just said, it's him, didn't you? Wasn't that your voice who said, it's him?

A. That matches the description, yes.

Q. I'd like to show you what's been marked as Defendant' s Exhibit No. 12, which is actually two pieces of paper. I'll make them 12 and 12-A. Previously, you said these were the criminal history reports that you received in the automobile?

A. I said they are criminal history. I don't know those are the exact ones I received, but they are criminal history reports, yes.

Q. After this was over, did you print out stuff for discovery or print out things that were provided to the defense, including these?

A. I didn't print them out.

Q. They seem to be printed out at :49. Somebody printed them out?

A. Yes.

Q. On those criminal histories, it says the name James Carter on one, but it says the name Terrence Byrd repeatedly, doesn't it?

A. Under aliases.

Q. But it has Terrence Byrd listed five or six times in—go [58] ahead.

A. But the actual name of the person that we go by is the first name; James Carter. He's telling me he's Terrence Byrd. And I have no photo ID right now.

Q. So you're waiting for New York to come back with a photo?

A. If they can.

Q. But in your mind, it certainly—what did you mean when you said, it's him?

A. Well, the tattoos matched. They're hard to—

Q. Hard to what?

A. To match those.

Q. In your mind, you most likely thought he was Terrence Byrd?

A. Most likely, yes.

(Video resumed playing.)

Q. So that's the New Jersey warrant coming back, correct?

A. No, that's the warrant I can see.

Q. Do you know what warrant that was?

A. It's a probation violation, I believe it was.

Q. Okay. I thought that was out of New Jersey?

A. Yes.

Q. Okay.

A. I don't get the actual warrant. Along with that line, it has a printout, and it has the person's name and it has social security numbers and dates of birth with it. And then it has [59] the ORI, which I explained earlier, which is originating agency. And then you have to call that number to confirm yes or no.

Q. So—but the printout you received, it says specifically they will not extradite him, don't pick him up?

A. We don't go by that, we still call.

Q. Did you call then?

A. The dispatcher calls, yes.

(Video resumed playing.)

Q. You were talking about the center console there, that he was grabbing the center console. Later when you searched the vehicle, there was nothing in the center console, was there?

A. No.

Q. There were no drugs or nothing illegal whatsoever in that console?

A. No.

Q. So your suspicions about the console were just wrong?

A. It was an indicator.

Q. A false indicator?

A. (No response.)

Q. You have to say yes or no.

A. Yes.

(Video resumed playing.)

Q. Who is that going up?

A. Trooper Martin.

[60]

Q. Now at this point, you didn't need any extra information from him? He had already given you a name and license that turned out to be accurate, correct?

A. He signaled Trooper Martin up.

Q. He called Trooper Martin up?

A. Yes.

(Video resumed playing).

Q. I guess you have a microphone on you or something and Trooper Martin does not?

A. Yes.

THE COURT: Mr. Thornton, turn it off a minute. I don't mind watching this if we're going to see something. But is there any way we can—

MR. THORNTON: Your Honor, unfortunately it's all —

THE COURT: What's this supposed to be now? What am I going to see later on?

MR. THORNTON: You will see that the traffic stop is elongated for a half an hour to 45 minutes after they should have given the ticket. If we could just run this for another three minutes, we'll get to the point where we can discuss it more intelligently. If you can give me until about 17, then I'll explain.

MR. BEHE: Before you start, I disagree with the characterization that this was prolonged after the point in time where he could have gotten a ticket. I think the [61] conversation that occurs over this 50-minute video shows that they were consistently trying to figure out who this individual was and reconcile the fact that it comes back as Carter and Mr. Byrd, and that is what consumed almost all the time.

If you cut it off at a certain point, and you don't hear that additional conversation back and forth, you're left with the impression that Mr. Thornton just gave you, that there should have been a warning issued and everything else prolonged it. But if you listen to it, unfortunately, that's how you understand that they were trying this entire time to reconcile who the individual was. So it may be that you have to—

MR. THORNTON: We would agree, Your Honor, but I think we do have to hear the whole thing because actually we believe the entire extra time is spent trying to figure out a way to get him out of the car and get consent.

THE COURT: Trying to figure out what?

MR. THORNTON: Trying to figure out a way to get him out of the car so they can get consent to search the car without any real evidence. If we can get to 17 minutes, Your Honor, I can explain, which is another two minutes or so. I can explain.

THE COURT: All right.

(Video resumed playing.)

BY MR. THORNTON:

Q. It sounds like you're typing there. Is that what you're [62] doing?

A. Yes.

Q. Now, Trooper, you would agree that if you look at the bottom, at the time counter on the bottom there, that you've been sitting, when you first turned on your recorder, it's been 17 minutes and 2 seconds; is that right?

A. Correct.

Q. And if we go back and look at the original Defendant's Exhibit No. 4, the video, you turned on your recorder at 6:11 p.m.; correct?

A. Correct.

Q. So 18:11. So you've been sitting here now for—instead of it being 18:11, it's now 18:28. So 17 minutes later since you turned the recorder on, correct?

A. Yes.

Q. I'd ask you now to look, if you could, at Defendant's Exhibit No. 6, and ask you if that's the warning notice that you gave to Mr. Byrd?

A. Yes.

Q. That warning notice has in it boxes that you have to fill out, including his name, his address, date of birth, license number, owner of the car, and a number of other things that you filled in; correct?

A. Correct.

Q. And if you look on the top right, there is an issued date [63] and an issued time; is that correct?

A. Correct.

Q. The issued time is 18:23, which would be 6:23 p.m.; is that correct?

A. That's correct.

Q. So this citation was actually issued prior to the time that we are looking at right here? This is 16:28?

A. No.

Q. It's not?

A. No.

Q. The citation says 18—

A. The issue time 18:23 is the time it's issued to me.

Q. Which is what?

A. That's the time I bring up the warning notice. That's not the time it's issued to him, that's the time it's brought up.

Q. Oh, correct. But at this point, you finished putting all your information in and you could issue that right now, couldn't you?

A. If it was completed.

Q. What did you have to put in there afterwards after this time?

A. I can do this in sections. I can put in the PV holding stuff, minimize the screen, and then come back and put in—because if you notice, there's actually an error on here. The license number on here is a New Jersey that we later recovered. [64] It's a New Jersey operator's identification number not a New York. So that's an error. That's a typo error because that's actually New Jersey, what you have in your Exhibit 5 at the top. That's an ID only. That's not a New York driver's license.

Q. So Mr. Byrd was carrying—if we look at Exhibit 5, you would agree that Mr. Byrd had a number of different identifications on him, didn't he?

A. He did not provide any of them.

Q. He provided you with the current valid driver's license, correct?

A. Yes. With no identification on it, no picture form of ID on it.

Q. But there's no picture on that license when it's issued by New York at that point, right? I mean, that's an interim license that does not contain a picture; correct?

A. That's correct.

Q. And the information you have on here, PV holding, Grand Central Parkway, all that came off of the information that you gave to Mr. Byrd—or Mr. Byrd gave to you at your initial encounter with him?

A. The rental agreement, correct.

Q. And it does say on the top, issued 18:23?

A. Again, it wasn't issued to him at 18:23.

Q. No, but you could have issued it to him at 18:23 because [65] all of the stuff that you needed to do for the stop was already done, wasn't it?

A. No.

Q. What wasn't done?

A. I don't know that I had his license at that time, his—

Q. You had—

A. I was still waiting on confirmation from the warrant. I was still waiting on a possible picture from New York.

Q. But you had already put his name and everything into this, right, at 16:23?

A. Yeah, but it wasn't issued to him. It was still in my possession.

Q. I'm sorry, 18:23?

A. No. 18:23 is the issue time that I bring it up in my car. It's not the time it's issued to him. It's issued to me at 18:23. I can put in it as I want and put it down as I want. Just because I bring it up at 18:23 doesn't mean I have to start typing everything in there and turn around and issue, especially in this case. We had two different names. We didn't have a positive ID. I can minimize it and come back to it as I am collecting my information from dispatch and from our intelligence center. So just because I pulled it at 18:23, that's what time I pull it. That's not issued to anybody but me.

Q. But the information that you put in there was the [66] information for Terrence T. Byrd, correct, because that's who you believed he was?

A. After I confirmed everything, yes.

Q. Now what exactly did you put into this violation notice after 18:23?

A. What I write on it?

Q. Yes.

A. The lat and longitude of the stop and the NIK test kit at the bottom.

Q. Not the writing itself, but inside the warning notice, the body of the warning notice, can you point to anything that you wrote in there after 18:23?

A. Well, all of it was after 18:23. Everything was put in it after 18:23. When it comes up, it comes up blank. The first box I click is the date. The second is the time. The third is location. And from there, it goes on. So everything is after 18:23.

THE COURT: All right. I think we're going to have to take a break. We'll recess until 1:15 at this point. Please keep an open mind. Don't discuss the case.

COURTROOM DEPUTY: Court's in recess until 1:15.

(Lunch recess was taken at 12:15 p.m. and proceedings reconvened at 1:25 p.m.)

BY MR. THORNTON:

Q. Trooper, before we begin playing the tape again, earlier [67] you mentioned the statute that was involved that you used as a basis for pulling Mr. Byrd over as 3313; 75 Pennsylvania Code 3313, is that right?

A. (D)(1).

Q. (D)(1)?

A. Section (d)(1).

Q. Now (d)(1) says—if I read (d), it says, except as otherwise provided in paragraph 2 and unless otherwise posted, upon all limited access highways having two or more lanes for traffic moving in the same direction, all vehicles shall be driven in the right-hand lanes when available for traffic except when any of the following conditions exist: And (d)(1) one would be, when overtaking and passing another vehicle proceeding in the same direction. Correct?

A. Correct.

Q. And (d)(2) though is, when traveling at a speed greater than the traffic flow; is that right?

A. Yes.

Q. So in this case, if the trucks are going slower than Mr. Byrd, he's allowed to remain in the left-hand lane until he passes those trucks that are going slower than the speed of traffic, isn't he?

A. No.

Q. Why not?

A. He's not actively passing.

[68]

Q. Didn't he just pass that truck at the beginning?

A. He passed the truck. He's required to get back in the right lane because if he passed the truck and he's past it, he's not actively passing another person.

Q. What about the truck that was in front of that truck that he passed?

A. There was a distance between those two trucks. He's required to get back in the right lane.

Q. But if those trucks are slower than the flow of traffic, he's allowed to go past them?

A. He's allow to pass them in the left lane, correct.

Q. We'll play the video now.

(Video resumed playing.)

Q. At that point you already had his driver's license number though, correct, from the driver's ID that he had given you; correct?

A. I had a New York one, yes.

MR. THORNTON: Your Honor, just for the record, I'd like to put in that we just passed the 21 minute mark.

THE COURT: Where are we going?

MR. THORNTON: 50 something.

THE COURT: How many?

MR. THORNTON: 50.

THE COURT: 50 minutes? What are we going to see—stop the tape for a minute. Would you make an offer of what [69] we're going to see?

MR. THORNTON: Your Honor, half of it is for me, and half of it is also what the Government wants to show, I believe, and I don't mean to speak for Mr. Behe. But we intend to show this stop was elongated past the time that was necessary to hand him or give him that warning ticket. And at one point in this, as a matter of fact I can give you an exact time, they say to each other, let's get him out of the car and try to get consent from him, a consent to search. And that happens—

THE COURT: Can you hear that clearly?

MR. THORNTON: You can hear that clearly. That doesn't happen until 38 minutes 35 seconds. But I just wanted to put on the record that we're now at 21:16.

THE COURT: Yeah, I can see that. That's good. So we're not even halfway through?

MR. THORNTON: No, not quite.

THE COURT: I'm reminded that I have a sentencing at 2:00, so we'll have to take a recess at 2:00.

MR. THORNTON: Yes, Your Honor. 51 minutes is when Mr. Byrd runs.

THE COURT: You don't want to move ahead to that?

MR. THORNTON: For me, there's an important part in between, unfortunately. I think Mr. Behe wants to have Your Honor hear the conversation between the troopers when they're [70] making these decisions as to what they're doing, I believe.

MR. BEHE: Yes. I think it's important for the Court to understand that this wasn't a conspiratorial conversation between the officers purposely delaying this car at the scene. As you can hear even at the 20 minute mark, they have no idea who they are and they're trying to identify who the person is. And I think that's what you'll continue to hear. Then their discussions about the demeanor of Mr. Byrd when they approach the car and what they say to him when they issue him the warning. I think those are all important considerations for the Court.

THE COURT: Okay. I'll be patient.

(Video resumed playing.)

BY MR. THORNTON:

Q. Trooper, we're here at 36:05 on the screen here, 36 minutes and 5 seconds. You said, that's him. Does that mean because the picture popped up on the computer and you saw that was him?

A. I don't know—I don't think we ever got a picture to be honest with you.

Q. What made you say, that's him?

A. I don't know if it was the confirmation from PaCIC or—I don't have in front of me—I don't know exactly at that moment what told me it was him.

Q. But you knew at that moment it was Terrence T. Byrd and [71] not James Carter, correct?

A. Yes.

Q. And that's at 36:05?

A. Well, I knew that person was either James Carter or Terrence Byrd. He was one of the—I knew he was one of those. Whether it was one and the same person, we weren't sure exactly at that time.

Q. What more could you have asked for to make sure it was the same person?

A. I didn't know if his real name was James Carter or his real name was Terrence Byrd. But I knew that person was either James Carter or Terrence Byrd.

Q. But you had already written the warning putting his—

A. No. I wrote it as Terrence Byrd, but I don't know if I had it completed at that time.

Q. But you put his name in as Terrence Byrd at that time?

A. Sure.

Q. The only way you would have thought it was James Carter is because you had his name come up one time on an old charge, correct?

A. The first time. The first name.

Q. On an old charge?

A. Correct.

Q. So at this time, you don't have any—you know the New Jersey warrant is not going to pick him up, and the only reason [72] you're on the side of the road there is to determine whether it's James Carter or Terrence Byrd?

A. I don't know that the confirmation came back or not. I mean, those dingings you hear are messages coming from both dispatch and PaCIC. I don't know exactly when that—

Q. When did you find out the warrant was not active?

A. Sometime during this stop,

Q. Before now?

A. I don't know.

Q. Before you got out of the car, you knew it wasn't active?

A. Yes.

Q. Let's see how long it takes for you to get out of the car.

(Video resumed playing.)

Q. So this time the voice, was that you again or was that the other trooper?

A. Trooper Martin.

Q. Trooper Martin said, who's this supposed to be? You guys aren't looking at a picture?

A. We could be. I don't remember. I didn't print it off so I don't know.

Q. So you—so that could have been his picture that popped up, and you could have actually known for sure that was Terrence Byrd, but you just don't know?

A. At that second with that first ding, yes.

Q. Now we've gone a little bit further. Do you still say you [73] just don't know?

A. I don't want to sit here and say I got a picture because I don't remember if I got a picture or not.

Q. So you could have gotten one?

A. I could have, yes.

Q. You could have gotten one actually earlier than this?

A. No.

Q. Why not?

A. Because we get our pictures from intel. I can't access out-of-state pictures.

Q. No, I mean, the intel could have sent you that picture earlier, you just don't remember when it came, if it came at all? You don't remember anything about the picture?

A. No.

Q. Whether it was there or not?

A. No.

Q. Or when—okay. You have to say yes or no.

A. No.

MR. BEHE: there's like seven questions being asked at the same time. I'm not sure which one gets answered.

THE COURT: I'm not sure what's being asked and answered here. What's your last question?

MR. THORNTON: Yes, Your Honor.

BY MR. THORNTON:

Q. I guess I could put all these questions together. You [74] have absolutely no recall at all when the picture got there, if there was ever a picture there?

A. Correct.

(Video resumed playing.)

Q. We are now at 38:41 and someone just said, we could try to get him out and try to get consent. Who was that?

A. Trooper Martin.

MR. BEHE: Could I ask you to back it up? Every time you stop it, I can't hear the whole sentence that's being said. So if you could just back it up a little bit?

(Complied.)

(Video resumed playing.)

BY MR. THORNTON:

Q. Okay. Now that's you, correct, getting out of the car there at 39:02?

A. Correct.

Q. Obviously, you have the written warning in your hand at that point?

A. Correct.

Q. When did you print that written warning out?

A. Right before I got out of the car.

Q. The second before you got out of the car?

A. It takes several seconds before I get out of the car.

Q. Were you printing it while you were talking there?

A. I can't answer that. I don't know.

[75]

Q. Now I noticed you're getting out of the car—well, go ahead. Play some more.

(Video resumed playing.)

Q. Now we're just at 39:12. You've gotten Mr. Byrd out of the car. Before this, both you and the other trooper had gone exclusively to the passenger side window and done all of your conversation through the passenger side window. You could have handed him that warning from the passenger side window, couldn't you have?

A. Yes.

Q. But you didn't. You made him get out into the lane of traffic where it's dangerous, didn't you?

A. Yes.

Q. So dangerous that you didn't even want to go around that corner, did you?

A. If you see 81, it's two lanes over. We're on an exit ramp and he's on the shoulder.

Q. You didn't answer my question. You didn't want to go out there either, did you, but you made him go out there?

A. We're not on 81.

Q. You did not want to go out into that exit lane, did you?

A. No.

Q. But you made him go out there, didn't you?

A. I was getting him out of the vehicle, yes.

Q. At that point, you had not seen any drugs in the car; [76] right?

A. No.

Q. You had not seen anything illegal, him do anything illegal at all except perhaps be in the left lane for two-tenths of a mile?

A. Correct.

Q. You got him out of the car to try to get consent for a search?

A. Not to try to get him to consent. I ask everyone for consent.

Q. You got him specifically out. Didn't Trooper Martin just say—didn't the other trooper just say, let's get him out and try to get consent, and you agreed?

A. We had a third party vehicle. So even if I don't need consent, I still ask for consent.

Q. That's not my question. What was your articulable reason to get him out of the car? What exactly were you searching to ask for consent for? What did you suspect?

A. There was some type of criminal activity afoot.

Q. Specifically, what type of criminal activity?

A. I don't know.

Q. No idea whatsoever?

A. Some type of criminal activity. No, I don't know.

Q. You were just hoping you would find something, weren't you?

[77]

A. No, I was basing it off indicators.

Q. Okay. Could you explain those indicators, please?

A. The nervous behavior, the different names, the no ID, the trip to Pittsburgh, rental vehicle, third party rental vehicle.

Q. Let's go back.

A. Not going into the center console.

Q. Start there. Center console. There's no reason for him to go into the center console. Was there any reason for him to go into the center console?

A. He couldn't locate his wallet at first.

Q. Was it in there?

A. I don't know.

Q. Was anything found in the center console that was illegal?

A. Illegal, no.

Q. Was anything found in the center console at all?

A. I don't know. I can't answer that.

Q. Secondly, you said trip to Pittsburgh. What's wrong with going to Pittsburgh?

A. Quick trip. From training and experience. New Jersey to Pittsburgh is a high drug trafficking area trip.

Q. That's a six-hour trip at least, seven-hour trip, isn't it?

A. Correct.

Q. That's not quick, is it?

A. What's that?

[78]

Q. Seven hours isn't quick, is it?

A. Well, it's a drivable distance.

Q. The other indicator you mentioned was no identification when, in fact, actually he did have identification and provided it to you. And by the time that you got him out of the car, you had already established everything in terms of his identity; correct?

MR. BEHE: Your Honor, again, there's like three questions all rolled into one.

THE COURT: I wish you'd break it down, too.

BY MR. THORNTON:

Q. He gave you identification, is that correct?

A. He gave me a piece of paper with a name and date of birth on it.

Q. That would be identification, wouldn't it?

A. Correct.

Q. And the next question. In terms of identity, at the time that you got out of the car, prior to the time that you were going to issue him the warning, everything in terms of his identity was already established; is that correct?

A. When I got him out of the car?

Q. Um-hum.

A. Yes.

Q. And everything regarding the New Jersey extradition matter was also established, correct?

[79]

A. Correct.

Q. So the other indicator—you mentioned he didn't give you ID, but, in fact, he did give you ID, the trip to Pittsburgh, and the console. And I think the other thing you said was that he was nervous, is that correct?

A. Correct.

Q. Was there anything else?

A. Third party rental vehicle.

Q. And what—but specific—I guess the only question I really want to ask is, there was no—you could not give me a specific indication of any type of criminal activity that you thought or you had proof that he was actually undertaking when you got him out of the car?

A. Ask that again. What are you asking me? I'm confused.

Q. When you got him out of the car, your object was to give him the warning ticket and then try to get consent from him to search the car; right?

A. You say, try to get consent. I knew I didn't need consent from him, but I ask anyway.

Q. When you got out of the car, your goal was to get him out of his car; correct?

A. Correct.

Q. You made him come around the back of the car and step to the side, correct?

A. Correct.

[80]

Q. And your goal after giving him the warning ticket was to get consent to search the car, right?

A. Request consent, yes,

Q. After the traffic stop was done, you wanted to ask him additional questions?

A. I think it was actually during the issuing the warning.

Q. Did you ever tell him he was free to leave?

A. No, he wasn't free to leave.

Q. He was not free to leave?

A. No.

Q. Did you ever tell him that?

A. No.

Q. Now when you testified at the preliminary hearing in this matter, which is Defendant's Exhibit

No. 9, on page 14, if we go to line 12, the question was asked of you—I guess you have to go to line 9. Line 9 is the question, which was, Now this is a result of the training that you indicated you received in interdiction and things of that nature? And your answer was, Yes. I issued the warning and gave him back his documents. And that's when I followed up with questioning. Question, But never told him he was free to leave? Your answer was, No. That part of the traffic stop was done. The written warning was done. And I moved onto additional questions.

Is that accurate?

A. Yeah.

[81]

Q. And that's what you swore to at the preliminary hearing, correct?

A. Yes.

THE COURT: I think this is where we're going to have to break. I'm hoping we'll be back in 15 minutes, but I'll ask you all to standby.

COURTROOM DEPUTY: Court's in recess.

(Recess was taken at 2:00 p.m. and proceedings reconvened at 2:35 p.m.)

(Video resumed playing.)

BY MR. THORNTON:

Q. So at that point, you got him out of the car and you patted him down; is that correct?

A. Yes.

Q. Just for the record, I would note that we are at 39 minutes 59 seconds into the videotape.

(Video resumed playing.)

Q. At that point, we just heard someone ask to see Mr. Byrd's tongue; is that right?

A. Yes.

Q. Who was that?

A. Trooper Martin.

(Video resumed playing.)

Q. So at that point, you specifically asked Mr. Byrd for permission to search the car, and he did not give it to you; [82] right?

A. He asked the question back to me.

Q. He did not say, yes?

A. Not at this point, no.

(Video resumed playing.)

Q. That was you speaking again?

A. Yes.

Q. Saying he had no expectation of privacy?

A. Yes.

Q. I guess you weren't aware that there is at least in the rental car contract that we have here, which is marked as Government's Exhibit No. 1, there is permission for the spouse to drive the car, isn't there?

A. Previous in the video, he stated to Trooper Martin it was a friend. He didn't say spouse.

Q. But you don't know whether that friend is a spouse or not, do you?

A. He said friend, not spouse.

(Video resumed playing.)

Q. So at 44 minutes and approximately 40 seconds, is that you getting into the car or Trooper Martin?

A. Me.

Q. Okay. Searching the car?

A. Searching the car, yes.

(Video resumed playing.)

[83]

Q. At 47 minutes 41 seconds, you have popped the trunk; is that right?

A. Yes, sir.

Q. And you have found nothing in the passenger compartment that was illegal, did you?

A. No.

Q. And is this in some way related to the left lane violation, this search?

A. What are you asking me? Is what related?

Q. Is this search of the car related to the left lane violation?

A. As a result of the left lane violation?

Q. Is it related to it?

A. The actual violation?

Q. Are you searching for other reasons other than the left lane violation?

A. Well, he admitted to snorting cocaine and there was a blunt in the car.

Q. But there was no cocaine and there was no blunt in the car, right?

A. No.

Q. Okay. Thank you.

(Video resumed playing.)

Q. Is the gentleman in the blue shirt the off duty state trooper that you described earlier?

[84]

A. Yes.

Q. And that's Trooper Swope?

A. Swope.

(Video resumed playing.)

Q. It's at 48 minutes 54 seconds. And it appears that Mr. Byrd has run off?

A. Yes.

MR. THORNTON: Your Honor, we can play as much further as the Government wants.

MR. BEHE: I don't think anything after this point affects what the Court needs to have before it to decide the issues.

THE COURT: All right. Very good.

MR. THORNTON: And we have no further questions of the trooper.

MR. BEHE: I have some redirect.

REDIRECT EXAMINATION

BY MR. BEHE:

Q. Trooper Long, I'd like, if you could, to help us out. Give us a better mental image of what you see out the windshield of your car when you pull out into the

left-hand lane on 81 and are trying to catch up to Mr. Byrd?

A. What do I see?

Q. Yeah. What's in front of you as you're looking out the windshield of your car?

[85]

A. A row of vehicles.

Q. All right. As you're approaching this row of vehicles from behind, they're in the left-hand lane as well?

A. Correct.

Q. What do they do one by one?

A. Get to the right-hand lane.

THE COURT: Are your lights on at this point?

THE WITNESS: No, Your Honor.

BY MR. BEHE:

Q. And at this point, is there a truck that gets over or is already over in the lane?

A. Yes.

Q. In the right-hand lane?

A. Yes.

Q. We heard Mr. Thornton suggesting it's unreasonable to have a car pull over between two trucks. And you get kind of the image in your mind that these are pretty close. Can you tell us or give us an idea of where these trucks were in relation to each other, meaning was it a safe distance that somebody could pull over after they got past the first truck?

A. It was a significant distance, yes.

Q. What would that be? If you are saying significant, what's that to you? Multiple car lengths?

A. Multiple car lengths. I mean, multiple tractor-trailer lengths.

[86]

Q. And your testimony is that Mr. Byrd did not pull into the right-hand lane despite that opening?

A. Correct.

Q. He continued in the left-hand lane?

A. Correct.

Q. When we see the video at the very beginning when it's playing, there is nothing on that video that shows the violation; correct?

A. Correct.

Q. Because you don't turn on the camera until your lights are activated?

A. Correct. The camera starts recording on its own once the lights are activated.

Q. Okay. So when you activate the lights, the recorder starts?

A. It goes back 30 seconds.

Q. You activated the lights after you saw the violation, correct?

A. Correct.

Q. So the violation is not on the camera?

A. Correct.

THE COURT: Can I ask a question at this point? This 30 seconds, what does it show? Is that 30 seconds of what you were seeing or is it—

MR. BEHE: It's the first 30 seconds on that video, [87] Your Honor.

MR. THORNTON: We can play it, Your Honor. It's the 30 seconds that doesn't have any audio to it.

MR. BEHE: The first 30 seconds of the video we played is what the recorder starts with once it's activated. So there's nothing that you're not seeing. That's the first 30 seconds that had been already recorded that it goes back and starts with.

THE COURT: I guess my confusion is, when you turn the lights on, the camera starts?

MR. BEHE: Yes.

THE COURT: The recorder.

BY MR. BEHE:

Q. The recorder is going continuously, correct?

A. Can I—

Q. Yeah.

A. Yeah. The recorder records non-stop, but it will only save 30 seconds prior to activating my lights. So every time—if I'm driving home in my unit, it's recording the whole way home. But if I never touch my lights, it just goes away. It doesn't save.

THE COURT: You mean it's running all the time?

THE WITNESS: Our cameras run all the time, yes, but they don't save unless our lights are activated or the record button is pushed. It doesn't save it.

[88]

THE COURT: It doesn't save, but the camera is running—

THE WITNESS: Constantly.

THE COURT: —constantly, okay.

THE WITNESS: Unless the car is powered off.

THE COURT: Okay.

BY MR. BEHE:

Q. So your testimony is that the violation that you witnessed is what made you turn on the lights?

A. Yes.

Q. So that the violation is not on the video that we saw?

A. Correct.

Q. Now you were shown some exhibits by defense counsel, and specifically Exhibit No. 5. Do you have that in front of you? Do you have the exhibits in front of you?

A. Yes.

Q. Was it your testimony that these multiple identification documents were never presented to you at the time of the traffic step?

A. Correct.

Q. How did you get them to take photocopies of them?

A. They were located during the search.

Q. So these had nothing to do with any document that Mr. Byrd presented to you?

A. Correct.

[89]

Q. You keep referring to a document with a name and a number on it that he handed to you as an identification document?

A. Correct.

Q. Is that what you call an identification document?

A. It wouldn't—I don't work in New York, I work in Pennsylvania. In Pennsylvania, if you are issued an ID, the ID would be exactly as the New Jersey identification on Exhibit 5. It would have your name, address, your assigned identification number. And it appears as a driver's license, but it's not a valid driver's license. So I have never seen a paper document in my nine years.

Q. Well, I guess what I'm saying is, why do you consider that to be an identification document?

A. I used the name and date of birth. That's really all it was used for.

Q. At one point on the video, there's reference to an SID number and it not being long enough or something. What is that?

A. State identification number. Every time you're arrested in a state, you're issued an FBI number and a state identification number. So you can run a criminal history through that state only.

Q. Now during the course of the stop, when you hand the warning to the Defendant, it sounds like you're apologizing to him for the delay; is that correct?

[90]

A. Yeah. I explained to him why it took so long, the confusion, and even questioned him about it, which, if you remember in the video, I was saying James Pearson, and he corrected me saying it was James Carter. I got the name confused from my car to speaking with him.

Q. And even though you learned that New Jersey was not going to extradite him, you had an individual at the side of the road who still had an active warrant out for him?

A. Correct.

Q. Who admitted to you that he had smoked marijuana?

A. Correct.

Q. And said that he had used cocaine?

A. Correct.

Q. Who was driving a rental vehicle that he didn't rent?

A. Correct.

Q. It was in the name of somebody who he said was just a friend?

A. Correct.

Q. And you were aware of his extensive criminal history?

A. Correct.

Q. Did you hear on the video the recording that was played here, it sounded like Trooper Martin saying to the Defendant when he is standing in the side of the road, if you want to fight, we'll fight?

A. Yes.

[91]

Q. Did you hear that at the scene or are you just hearing it now on the video?

A. I remember it from the scene, but, I mean, the video refreshed my memory, yes.

Q. Because I had asked you that earlier, and you said it was cordial. And I'm trying to figure out what—if you recall what gave rise to Trooper Martin saying, if you want to fight, we'll fight?

A. The entire encounter was cordial, even through the foot pursuit to the apprehension. There was no excessive force, no type of force used whatsoever. Mr. Byrd complied throughout the whole thing. It was more, at times you hear Mr. Byrd laughing on the video. I mean, the entire stop from start to finish was cordial. There was no threatening demeanor towards anybody or anything like that. It was said in a joking manner.

Q. I can say I don't think I've ever heard anybody describe chasing a fugitive as a cordial encounter?

A. Well, I mean—

Q. You're saying, when you caught up to him, he didn't resist?

A. Yeah. We've been in many foot pursuits where, you know, force is needed. I mean, he was ordered to the ground. He went to the ground. He was handcuffed. He was searched again. I mean, there was no threatening—I mean, even, you know, in the back of our mind, we knew his extended history. But he was [92] polite with us. I mean, there was—he actually made the statement to me that he'll run every time.

Q. He will run every time?

A. He will run every time.

Q. Was that before he ran or after you caught him?

A. After we caught him.

Q. Now as we are watching the video, it appears that the Defendant is pacing back and forth?

A. Yes.

Q. On the side of the road?

A. Yes.

Q. At one point, he appears to kneel down or sit down?

A. Yes.

Q. Were you able to observe that conduct while you were there searching?

A. Yes,

Q. Are you familiar with individuals that are under the influence of controlled substances?

A. Yes.

Q. You have an individual here who told you that he had smoked a blunt and ingested cocaine?

A. Yes.

Q. In your experience, did he give you reason to think he may have been under the influence of drugs?

A. Potentially. And you hear Trooper Martin even ask him if [93] he was, I believe he said, are you hopped up now, or something to that effect.

Q. Did you ever get consent from the Defendant to search the vehicle?

A. I believe he said, yes, but then he wanted to get—he said, yes, I'll get it for you. We told him we'd get it.

Q. Meaning what?

A. That he would get the blunt out of the car.

MR. BEHE: That's all I have.

THE COURT: Anything further, Mr. Thornton?

MR. THORNTON: Yes, Your Honor, just briefly, if I could.

RECROSS EXAMINATION

BY MR. THORNTON:

Q. Regarding Defendant's Exhibit No. 5, which is all the different cards found inside the car. Were you the one who found the cards?

A. I'm not a hundred percent. I can't answer that.

Q. Okay. But looking at Defendant's Exhibit 5, would you agree that these came from the car where Mr. Byrd was driving?

A. Yes.

Q. And you never specifically asked to see any credit cards, did you?

A. No.

Q. You didn't specifically ask to see the New Jersey ID, did [94] you?

A. I didn't know he had one, no.

Q. And you didn't ask to see his vehicle registration for a motorcycle, did you?

A. No.

Q. Or you didn't ask for the social security card—I know you asked for the number, but you did not ask to see the card, did you?

A. No.

MR. BEHE: I think the trooper said he didn't know anything about these cards and that's why he didn't ask for them, so I don't see the point in asking him why he didn't ask about something he didn't even know even existed.

THE COURT; Okay.

MR. THORNTON: That's fine, Your Honor. I have a couple more questions, if I could.

BY MR. THORNTON:

Q. I want to make sure I got the driver's license thing correct. If I could find the exhibit that I had previously—I believe Your Honor might have the washed one?

THE COURT: This?

MR. THORNTON: Yes, thank you.

BY MR. THORNTON:

Q. What we marked as Defendant's Exhibit 13, that's the actual piece of paper that was given to you by Mr. Byrd; right?

[95]

A. Correct.

Q. And that is entitled—what's it say on the top?

A. Well, it appears to be split in half. It says, customer receipt interim license driver's license.

Q. So that's actually an interim copy of an interim or receipt for an interim driver's license, is that correct?

A. Yes.

Q. And it has on it the date of birth, is that correct?

A. It's handwritten on there, 7/19/77.

Q. It's actually printed on the form?

A. Yes.

Q. Mr. Byrd was only the lead vehicle at the very beginning of the stop when you pulled out and followed him? He was the lead vehicle alone in the lane, there was no one else in front of him for approximately half a mile; is that correct?

A. Wait. You said he was the lead vehicle when I pulled out? No, I wasn't.

Q. I'll rephrase. Concerning the time you pulled out?

A. Yes.

Q. During that time when you first pulled out, he was not the lead vehicle; right?

A. No.

Q. It was a truck?

A. Yes.

Q. He alone was the lead vehicle for no more than—well, [96] you said two-tenths of a mile; is that right?

A. Yes. But, no, because the two-tenths of a mile is the violation. He was the lead vehicle after he passed the truck that you see on video. So it would be longer than two-tenths of a mile.

Q. But as soon as he passed the truck though, he got in the right lane, didn't he?

A. He traveled a short distance and then got over, yes.

Q. And lastly, you indicated that when you asked him for consent, at first he sort of said he would, but then he said, no, I'll get it for you? And after that, you guys said, no, we'll get it?

A. He said, I'll get it for you, yes. No one gets back—no one will retrieve any contraband.

Q. Right. But after that, he never gave you consent after that, did he?

A. No.

MR. THORNTON: Thank you. I have no further questions.

THE COURT: I think that's all.

MR. BEHE: Just one question to clean up a document that Mr. Thornton had, Exhibit No. 13.

REDIRECT EXAMINATION

BY MR. BEHE:

Q. You referred to those split pieces of paper as a receipt [97] for a license, but there's handwriting off to the side that says Tillman and some numbers. Is that your writing?

A. No.

Q. What was that on? Where did that come from? Is it part of those documents that were handed to you?

A. I don't know where it came from.

MR. BEHE: Okay.

MR. THORNTON: If I could follow-up?

RECROSS EXAMINATION

BY MR. THORNTON:

Q. Mr. Byrd didn't hand you a piece of—an 8 and a half by 11 piece of paper, he handed you the little tiny thing?

A. Yeah, the photocopy portion, yes.

Q. So whatever else is on that piece of paper is not what Mr. Byrd gave you?

A. Correct.

MR. THORNTON: Thank you. I have nothing further.

MR. BEHE: Nothing else, Your Honor.

THE COURT: Okay. Thank you, sir.

TRAVIS MARTIN, GOVERNMENT'S WITNESS, SWORN

COURTROOM DEPUTY: Would you please state your name?

THE WITNESS: Trooper Travis Martin.

COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MR. BEHE:

[98]

Q. Trooper Martin, can you tell us please how long you've been employed by the Pennsylvania State Police?

A. Nine years.

Q. What are your current duties and responsibilities?

A. I'm currently assigned to BCI, Shield Unit.

Q. And what is that?

A. It's highway criminal interdiction.

Q. What do you do?

A. We are—I'm in a marked unit on the highway looking for criminal activity flowing through the interstates of Pennsylvania.

Q. And have you been trained in that?

A. I have.

Q. And can you tell us a little bit about your training?

A. I've been trained through the Pennsylvania State Police Academy with identification of narcotics. And then I've had interdiction training, shield training through PSP, some DIAP commercial vehicle/motor vehicle training, which goes through interviews, what to look for in cars and stuff going down the highway. I've also had some Top Gun training, which is undercover training related to drug work.

Q. And specifically, what are some of the things that you've been trained to look for to be indicators when there is a motor vehicle stop or a suspected violation of the Motor Vehicle Code?

[99]

MR. THORNTON: Your Honor, we would object to this as irrelevant. He's not the trooper who stopped him. He's just the back-up trooper. So his—

THE COURT: I think it's okay at this point at least. You may answer.

THE WITNESS: We look for, we've been trained indicators of nervousness, how the operator answers questions, the way he presents himself, what may be in the car, rental vehicles, stuff like that.

BY MR. BEHE:

Q. Okay. Were you working on September 17th of last year?

A. Yes.

Q. In a marked unit?

A. Yes.

Q. And around 6:00 in the evening on that day, where were you located?

A. I was located in the center median approximately mile marker 75 on Interstate 81.

Q. Okay. Would that be closer to the Hershey or the Linglestown exit?

A. It would be almost directly in the middle, but a little closer to the Hershey exit.

Q. And traffic going to Harrisburg would be traffic going south on 81, correct?

A. Yes.

[100]

Q. And you were in a marked unit?

A. Yes.

Q. Do you know where Trooper Long was in relation to your vehicle, closer to Harrisburg or closer to the Hershey exit?

A. He was north of me.

Q. So closer to the Hershey?

A. Yes.

Q. Can you tell us what happens then, what you see?

A. As I'm sitting there, I get a response from Trooper Long relating that he's making a traffic stop, and I respond to his location.

Q. Once you get to the location, do you talk with Trooper Long about what the purpose was of the stop?

A. Yes.

Q. And what was it?

A. He related that the operator was traveling in the left lane without passing anybody, so he pulled him over for that.

Q. Did you approach the vehicle for any reason?

A. I did.

Q. Can you tell us why and what you did when you got to the vehicle?

A. I was talking to Trooper Long, and I was motioned by the operator, I believe Mr. Byrd, to come to the vehicle.

Q. So it's Mr. Byrd who summons you up to the vehicle?

A. Yes.

[101]

Q. Which side of the vehicle do you go to?

A. The passenger side.

Q. And tell us what happens when you get there?

A. I come up, I ask him what he needs because he waved me up. And he hands—he tells me about his driver's license. He had the driver's license number for me.

Q. He had the number for you?

A. Yes.

Q. What was that on?

A. He had talked to somebody on the phone and had gotten that number, so he was giving it to me to write down.

Q. So you wrote the number down?

A. I believe I wrote it down or he handed me the number. I don't recall.

Q. So this was not a formal document, it was a handwritten thing either you wrote or he wrote and gave to you?

A. Yes.

Q. Can you describe his demeanor for us that you observed when you first encountered him?

A. Immediately upon making contact with him, I saw that his hands were shaking and that he was moving all over the place in his vehicle.

Q. What else?

A. I observed that he just lit up a cigarette and that he was on the telephone as I approached.

[102]

Q. Did he make eye contact with you?

A. It was sparingly. He looked away from me most of the time. Every now and then, he looked at me.

Q. Do you know who he was talking with on the phone?

A. I took it to be the mother of one of his children.

Q. And how do you know that?

A. Because he said it was his—I believe he said it was his baby's mother out in Pittsburgh he was going to see.

Q. That he was going to see?

A. Yes.

Q. What did you do then at this point?

A. At that time, I took the information he gave to me and I went back to Trooper Long.

Q. Is there an exhibit up there marked 13 in front of you?

A. Yes.

Q. Do you recognize that handwriting and those numbers? I know it's a photocopy of a couple documents. But I guess my question is, is that what was either written by you or handed to you by Mr. Tillman—or Mr. Byrd?

A. Yes, Mr. Byrd.

Q. So now you go back to the vehicle that Trooper Long is in, correct?

A. Correct.

Q. What are the two of you trying to do while you're in the vehicle in terms of this stop?

[103]

A. Trooper Long had explained to me he wasn't sure if this was the correct information given as to who the identity of the operator was, so we were trying to figure out if this was who he said he was.

Q. And while you're there, did you make any attempt to clear up anything about the rental status of the car?

A. Yeah. We had a conversation as to who had rented the vehicle.

Q. Did you go back and speak to Mr. Byrd about that?

A. Yes.

Q. Can you tell us what he told you about who rented the car?

A. I believe he told me a friend had rented the vehicle.

Q. And did you relay that information to Trooper Long?

A. Yes.

Q. Was there a point in time when you again approached the vehicle or you and Trooper Long

approached and actually issued a warning to the Defendant?

A. Yes.

Q. Can you describe for us, please, the conversation that takes place when he's being given a warning?

A. Trooper Long relayed to him once again what the violation was and then talked to him about the length of the stop, why it had taken so long, because he had a warrant out for him and New Jersey didn't want him, but there was a warrant—we weren't sure if he was the guy because there was two different names [104] that were coming up when we ran his information.

Q. Can you tell us if, based on everything that you were aware of up to that point, you had suspicions that there might be some sort of criminal activity going on or some evidence of that in that vehicle?

A. I did.

Q. Were you aware of the Defendant's criminal history?

A. I was.

Q. Did it involve narcotics, weapons, assaults, things of that sort?

A. Yes.

Q. He had different identities?

A. Yes.

Q. And there was an outstanding warrant from New Jersey even though they didn't want him?

A. Yes.

Q. When Trooper Long began searching the vehicle, had the Defendant mentioned that he had a marijuana blunt in the car?

A. Yes.

Q. What is a blunt by the way?

A. It's a marijuana cigarette.

Q. And what did he say, that he had had it in there or smoked it or both?

A. He mentioned that it might be in there, that he had smoked a marijuana blunt.

[105]

Q. Was there any—did he say anything else about what other drugs he might have ingested?

A. Right when Trooper Long started searching, he said, I did snort some coke earlier.

Q. Did you ask him about that more?

A. I believe I had a brief conversation as to why he was smoking—or snorting coke.

Q. Can you describe the Defendant's demeanor on the side of the road after he's admitted that he's had a marijuana blunt and that he's ingested cocaine? How is he acting?

A. He was very agitated. He was bouncing—I call bouncing around. He was moving side to side, wouldn't stand still, looking around. Just very fidgety.

Q. At one point on the video that was played for the Court, you were heard to say words to the effect, if we got to fight, we'll fight. Do you remember that?

A. Yes.

Q. What caused you to say that?

A. Just based on his behavior, his past, and his close proximity to me. He kept getting close to me.

Q. What do you mean he kept getting close?

A. Like he walked closer to me. I had him standing to the front and to the side of his stopped rental vehicle.

Q. Did you search the trunk?

A. I did.

[106]

Q. Can you tell us what you found?

A. I popped the trunk, and I saw a large, like sort of like a laundry bag. And I just looked, pulled up the

end of it, looked inside, and saw what appeared to be body armor or like a bulletproof vest.

Q. What did you do at that point?

A. At that time, I leaned over to the driver's side where Trooper Long was and said, hey, I just found this, I'm going to detain him based on this, his past, and the way he's acting. And at that time, I retrieved my handcuffs from the front of my utility belt, and I told Mr. Byrd, I said, hey, I'm going to place you in cuffs, you're not under arrest.

Q. What happened then?

A. At that time, Mr. Byrd smiled at me and said, nah, and proceeded to run southbound on the shoulder of Interstate 81.

Q. Did you join in the chase?

A. I did.

Q. Were you the one who actually caught up with and took him into custody?

A. It was me and an off duty trooper, yes.

Q. Had you not seen the body armor, you had an individual who admitted to you that he had ingested marijuana and cocaine driving a third party's vehicle, did you believe you had probable cause to charge him with any offense or to search the car without his consent?

[107]

A. Yes.

MR. BEHE: That's all I have.

THE COURT: Cross-examine.

MR. THORNTON: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. THORNTON:

Q. Trooper, in the part where you indicate to him, if you want to fight, you guys are just standing by the back of the car while Trooper Long is inside searching the car?

A. We're standing beside the car.

Q. And during that time, did you have your hand actually like on your holster when you were talking to him?

A. Probably in the vicinity, yes.

Q. And did you actually shoot tasers at him while he was running?

A. I did.

Q. Did Mr. Byrd ever identify himself to you as this James Carter person?

A. No.

Q. You indicated you said you believed he said a friend rented the car. Could he have said that his kids' mother rented the car?

A. He could have.

Q. When you looked in the car, as a result of all your training, I assume you looked around to see what was inside the [108] vehicle in case there was something important?

A. Yes.

Q. And you didn't see anything illegal in the car, did you?

A. Not in plain view, no.

Q. And you never found any blunt or any cocaine, did you?

A. No.

Q. Did you write a report at the end of all of this?

A. I did not.

Q. So you don't have any notes of any of this, it's just from memory?

A. Yes.

MR. THORNTON: Thank you. I have no further questions, Your Honor.

THE COURT: Thank you.

MR. BEHE: Just a follow-up, if I could.

REDIRECT EXAMINATION

BY MR. BEHE:

Q. Trooper Martin, you were asked, could something have been said or could something else have been said about whether it was his baby's mother or whatever it is. This is June of 2015, and this incident took place September of 2014. Would you rely on what you said on a tape as being more accurate than your memory here today about what might have been said?

A. Yes.

MR. BEHE: That's all I have.

[109]

THE COURT: Okay.

MR. THORNTON: I have nothing further, Your Honor.

THE COURT: I think that's all, sir. Thank you.

MR. BEHE: We have no other witnesses to call, Your Honor.

MR. THORNTON: Your Honor, at the beginning of the hearing, the Government raised the issue of standing, which I think we still have to address in some way. We have a witness who will be vital to the standing issue. We were unaware it was

going to be an issue prior to the hearing. I was wondering whether Your Honor would rather have Mr. Byrd testify at the time we have the other witness here or have Mr. Byrd testify now? I was only going to have him testify about how the car was rented.

THE COURT: Well, I think he should testify now at this point.

MR. THORNTON: Okay.

TERRENCE BYRD, DEFENDANT, SWORN

COURTROOM DEPUTY: Would you state your name, please?

THE WITNESS: Terrence Byrd.

COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MR. THORNTON:

Q. Mr. Byrd, if I could take you to the rental or how you got the rental car. Can you please tell us how that all occurred [110] and who rented the car?

A. My kids' mother, Latasha Reed, rented the car for us.

THE COURT: Keep your voice up. I can't hear you. Speak into the microphone.

BY MR. THORNTON:

Q. Pull the microphone toward you.

A. My children's mother, Latasha Reed, rented the car for us.

Q. Could you spell that name for us?

A. L-A-T-A-S-H-A. Last name. Reed, R-E-E-D.

Q. Where does she live?

A. We lived at the same address, 482 11th Ave, Patterson, New Jersey.

Q. How are you related to her?

A. Well, she was my fiancee. We was about to get married soon. I've been with her for 17 years. She is the mother of most all my kids. I have five kids with her.

Q. And is actually one of the children here sleeping in court?

A. Yes, that's my youngest daughter by Latasha Reed, yes.

Q. Were you there when she rented the car?

A. Yes. I was there—we was in the process of moving, and instead of using my vehicle, we let her use my Honda Accord, she would drive that to move all of her stuff out of the house and make the transition from one place to the next. So we got her a vehicle at that time because we only had one vehicle. My [111] van was stolen.

Q. So let me stop you there. You guys were moving and you only had one car?

A. One car, yes.

Q. Where did you go to rent the other car?

A. We went to Hertz up in Willow Brook Mall in Wayne, New Jersey.

Q. Were you there actually with her when she rented it?

A. I was there. I was actually in my car when she went and picked up that car.

Q. Did you go inside the establishment or anything?

A. No, I just sat in the car until the guy brung her the keys and go around the car.

Q. Where were you moving to?

A. I was moving to Pittsburgh to look for—see if the conditions was good. But also my job was down there, too. So I went to look for some residence.

Q. What was the arrangement between the two of you as far as the rental car is concerned?

A. We shared vehicles all the time, so I just said, you use the Honda Accord to move this stuff, don't use the rental, because we didn't want to destroy it, you know, putting boxes and household appliances inside it. So we just used the other vehicle for that.

Q. How did you get the rental contract?

[112]

A. She went in there. She went—actually she called and made reservations. We actually missed the first reservation appointment, and we went there late. So it was like around closing time that we got there. So they gave us the car.

Q. Did she actually hand you the rental contract or how did you get it?

A. Well, she gave it to me. We exchanged cars. We actually exchanged at the mall.

Q. What time frame was this in relation to your being stopped here on the highway? Was it a week before or a day before?

A. Same day. It was the same day. Maybe about 3:00 in the afternoon prior to that day, yeah, about 3:00, 2:30.

Q. That you rented the car?

A. Yes.

Q. And then you took it directly to Pittsburgh?

A. No. I went home, did some more moving stuff around to storage and everything like that.

Q. Thank you. I have no further questions.

A. Can I say something? I also have my storage thing that I rented the storage place that same day. It's in the part of the—

Q. Oh, that little card that has the numbers on?

A. That's the access code, yes. That was also rented on the same day, so we was moving stuff in and out.

Q. That was in amongst the documents that were taken from you [113] at the time of your arrest?

A. Yes.

MR. THORNTON: Thank you. I have nothing further.

CROSS EXAMINATION

BY MR. BEHE:

Q. Mr. Byrd, Government's Exhibit No. 1 in this case is the rental agreement. You didn't sign that document?

A. No, we didn't sign it.

Q. I said, you didn't sign it?

A. No, I didn't sign it.

Q. I think your lawyer is handing it to you. As a matter of fact, you didn't even go in the rental place when your girlfriend got the car; is that correct?

A. No, I was sitting in the front of the building.

Q. So you did not go in?

A. No.

Q. Your name does not appear on that agreement that's in front of you, does it?

A. No.

Q. There's a section on the second page, if you look for it. You got the second page there?

A. Yes, I see it.

Q. Down at the bottom, there's a number of lines to be filled in. One of them says, renter. Do you see those marks there?

THE COURT: What number are we looking at now?

[114]

MR. BEHE: This is the second page of Exhibit 1.

THE WITNESS: Yeah, I see renter.

MR. BEHE: Your Honor, that's Defense Exhibit 1, this is Government's Exhibit 1.

THE COURT: I don't know that I have that. Oh, yes, I do, I'm sorry.

BY MR. BEHE:

Q. If you go to the second page—you got it?

A. Yes, I'm on the second page.

Q. See the bottom where those empty lines are?

A. Yeah, I see it. It says, renter, and then additional driver.

Q. Where it says renter, is there something written there?

A. It looks like a bunch of lines. It don't even look like a signature.

Q. Isn't that Latasha Reed's signature?

A. No, that's not Latasha Reed's signature.

Q. Are you saying someone other than Latasha Reed rented this vehicle?

A. I don't have no idea, but that's not Latasha Reed's signature from what I'm looking at.

Q. Well, look at the front of the agreement, the first page?

A. That's Latasha Reed's signature at the bottom of the first page.

Q. And on the second page, are you saying that doesn't look [115] like her signature?

A. No.

Q. Where it says, additional driver, is your name listed?

A. No.

Q. There's nobody's name listed for additional driver, correct?

A. No, sir.

Q. You said that you rented this vehicle on the very day that you were stopped?

A. I said that Latasha rented the vehicle, not me, sir.

Q. That's right, she rented the vehicle. And it was rented on the day that you were stopped, correct?

A. Correct.

Q. September 17th of 2014. And if you look at the first page of the agreement, do you have that there?

A. Yes.

Q. The first page at the top left-hand portion, it says that it was rented, pick-up date and time, September 17th 2014 at 10:26 in the morning. Do you see that?

A. Yes.

Q. You were stopped at around 6:10 p.m. in Pennsylvania, correct?

A. Correct.

Q. Where did you go after you got the car?

A. Where did I go after I got the car? That day, I went [116] home. That day, she went and took the kids to the hospital to—they actually—I don't know if it was my daughter or my son had a doctor's appointment, a doctor's appointment on Market Street. Right before I left, I don't know the times, but I went home, actually threw my clothes inside the rental. Mr. Martin, you seen the box back there. Took my clothes out of the house and packed it up in the car. And then I met up with Latasha. And I did a few things in between that. And then I got on the road.

Q. So the car was yours essentially from the minute that your girlfriend rented it and turned it over to you in the parking lot?

A. Yes.

Q. It was in your custody?

A. It was in my custody. We decided to change vehicles, yes. We left the mall together, but I was driving the Ford Fusion.

Q. I guess I was asking where you went because from the time that you got the car outside of the rental place until the time you get stopped, and you have complete custody of the vehicle, somehow all that heroin and a bulletproof vest gets in the trunk?

MR. THORNTON: Your Honor, we're going to object. It's beyond the scope.

THE COURT: I'll sustain the objection.

BY MR. BEHE:

[117]

Q. Are these the only children you have, these five to Latasha?

A. Yes.

Q. Did you tell—

A. I have numerous other kids that I haven't had DNA tests with that I am supposed to be the father. I have numerous—during my time, I had a lot of girlfriends, you could say.

MR. BEHE: If I could have a second? That's all I have.

MR. THORNTON: We have nothing further.

THE COURT: All right. Thank you, sir.

MR. THORNTON: Your Honor, we do have one other witness we would want to call, but she is not here because we were unaware we would have to address this issue.

THE COURT: Who is that?

MR. THORNTON: Latasha Reed. I was wondering if we could continue this until a time that would be appropriate to have Ms. Reed here?

THE COURT: Yes. You'll need Mr. Byrd at any continued hearing.

MR. THORNTON: Yes, Your Honor. And I'll need to contact her. Up until this morning, I have not had any contact with her.

THE COURT: Okay. I will set a time when you get in touch with her and contact me.

[118]

MR. THORNTON: Yes, Your Honor, thank you.

THE COURT: Could I see counsel up here for just a moment, please?

MR. THORNTON: Your Honor, we would move the admission of our exhibits, if we could, which would be 1, 2, 3, 4, 5, 6, 7, 9, 11, and 13.

THE COURT: Okay.

MR. BEHE: No objection.

THE COURT: Those are admitted.

MR. BEHE: And I move for the admission of Government's Exhibit No. 1, if I have not done that, which was the rental agreement, Your Honor.

THE COURT: We'll admit that, too. We will adjourn for the day. Thank you.

COURTROOM DEPUTY: Court's adjourned.

(Proceeding adjourned at 3:30 p.m.)

CERTIFICATION

I, Wendy C. Yinger, Federal Official Realtime Court Reporter, in and for the United States District Court for the Middle District of Pennsylvania, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

UNITED STATES OF
AMERICA

Case No. 1:14-
CR-00321

vs.

(Judge Caldwell)

TERRENCE BYRD,
Defendant

TRANSCRIPT OF SUPPRESSION HEARING
PROCEEDINGS BEFORE THE HONORABLE
WILLIAM W. CALDWELL
UNITED STATES DISTRICT COURT JUDGE
JULY 8, 2015; 10:35 A.M.
HARRISBURG, PENNSYLVANIA

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

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[3]

THE COURT: I understand, Mr. Behe, you have a witness to present.

MR. BEHE: Yes, I do, Your Honor. Mr. Walther.

ROBERT WALTHER, called as a witness, having been duly sworn or affirmed, testified as follows:

COURTROOM DEPUTY: Would you state your name, please.

THE WITNESS: Rob Walther.

COURTROOM DEPUTY: Could you spell your last name.

THE WITNESS: W-a-l-t-h-e-r.

DIRECT EXAMINATION

BY MR. BEHE:

Q. Good morning, Mr. Walther.

A. Good morning.

Q. Could you tell us what you do for a living?

A. I am a territory performance manager for the Avis Budget Group with rental cars and rental trucks.

Q. What exactly do you do?

A. I manage ten locations in the Baltimore area, go around every single day to make sure everything is in order, making sure numbers are—continue to be up, and just general managerial factors with a location.

Q. Are you responsible or have you been trained in the procedures that are used by the employees for renting vehicles?

A. Yes, sir.

Q. Is that part of your job responsibilities when you said you [4] were a compliance person?

A. Correct. I train all my operators through online training and then on-hands training at different locations.

Q. And is that standard with Avis and Budget?

A. Throughout the whole corporation, yes, sir.

Q. Can you describe for us, please, the process of renting a vehicle by an individual that would go to the counter?

A. So an individual will come into any one of our locations, they'll come to the counter, usually say they have a reservation or they need to rent a car or a truck.

At that point the operator will ask for a license and a credit card. They'll pull up their reservation, see exactly what kind of vehicle they need. From there, they will basically go through the checkout process as

far as what vehicle they need, what coverages, additional products, XM radio, things like that, and then also additional drivers.

Before they have the customer sign the contract, they go through what the customer selected and didn't select from our products. If they do ask for an additional—or they ask if anyone else will be driving the vehicle. If that person says no, then they will sign off on the contract and be on their way.

If they say yes, the agency operator will ask who will be driving. If the customer says my wife or husband, they will ask to see a license to make sure they're a licensed driver. [5] If it's going to be a son, brother, friend, then there will be a fee associated with the additional driver,

Q. All right. If we could back up then a bit. Is there a standard form that is used in this process that then has to be filled out and signed?

A. Yes. After every single contract is printed, the second page has basically the additional driver referendum that would go through saying who can be an additional driver without paying a fee and then also who will need to pay a fee with the additional driver.

Q. So if you are asked if there is an additional driver and the response is yes, what is it that is required before somebody—

A. Well, they will ask who the additional driver is, and if the customer states it's my husband or wife, the

agency operator behind the counter will ask if they are present so they can see that they are a licensed driver.

If they are not present, they will make notes on the contract, and that person's name will not be on the contract until that person returns to the location to validate the license. If it—

Q. Well, let's—before you go on there, so if the spouse is standing right there beside the person who is renting it, they're required to produce a license?

A. Correct.

[6]

Q. And would their name be added to the contract?

A. Their name would be added to the contract, the license number would not. It would just be to make sure that they were a licensed driver.

Q. Do you run the license to make sure that it's still valid or there's no outstanding warrants or anything?

A. No, sir, just the customer that is renting the vehicle.

Q. But that is required to be produced?

A. Correct.

Q. And the name would be on the contract?

A. Correct.

Q. And then you also told us there would be a situation where somebody would come in and say, my spouse is going to be an authorized driver, but they're not here, they're at work or something like that. Is that correct?

A. That is correct.

Q. And you said there would be a notation made. What do you mean by that?

A. In the system. At that point it would still just be the customer on the contract, but there would be in the remarks field in our business system saying that husband or wife will be an additional driver, need to verify the husband or wife's license.

Q. All right. What if there is—and what do you mean by "verify"? What would they have to do?

[7]

A. They would have to actually see a physical driver's license to make sure they were a licensed driver.

Q. So if the spouse was not there because of some other activity that kept them away from there, they would not be an authorized driver until they actually came into the place and showed a valid driver's license?

A. Correct.

Q. How are those notations kept in the system if a spouse isn't there but it's been indicated that they may also be a driver?

A. That would be in the remarks field that will only be seen by corporate employees. It won't get printed out on the contract. But that way if that husband or wife, spouse goes to any Avis Budget location, they will see right there on their screen the remarks that they still need to see a license to be a valid driver.

MR. BEHE: May I approach, Your Honor?

THE COURT: Certainly.

BY MR. BEHE:

Q. I'm going to show you what was marked at our earlier hearing as Government's Exhibit Number 1. Do you recognize that form?

A. Yes, sir.

Q. Is that the standard agreement that you were talking about earlier?

[8]

A. Yes, sir.

Q. Now, this one in particular was for a Latasha Reed. Look over that form, if you would, please, and tell me, are there any advisories or warnings on there about who is permitted to drive the vehicle that she was renting?

A. On the second page there is a paragraph regarding who is permitted to drive the vehicle other than herself.

Q. And on the first page where her signature appears around the middle—

A. Yes, sir.

Q. —is there a sentence in there that says, I affirm that I will be the only one driving this vehicle?

A. Yes, sir.

Q. What does it say?

A. "By my initials, I accept or decline optional services/products as shown above."

Q. Let's see if I can direct your attention to what I'm talking about here. No—

A. "No additional drivers allowed without prior written consent. Tickets, fines, and administration fees to be charged to this rental."

Q. And then is there a name that appears there?

A. It looks like a Latasha Reed.

Q. So by signing that, she indicated there would be no additional drivers without written consent. Correct?

[9]

A. Correct.

Q. On the second page of the form, is there anything in there that shows you that an additional driver was authorized to drive that vehicle?

A. No, sir.

Q. Is there any other name there except hers?

A. No, sir.

Q. Anything to indicate that anybody was with her at the counter that produced a driver's license?

A. No, sir.

Q. Did you pull this file up electronically to check that notes section that you described to see if at any other time Mr. Byrd or anyone else came to the rental agency and produced a driver's license to be an authorized driver?

A. I did, and I did not see anything in our remarks field.

Q. Do you—if police officers stop a vehicle, has it been your experience that they will often call to see whether or not the individual with the car is an authorized driver or not if it's a rental vehicle?

A. Yes, sir. The contract must stay in the vehicle at all times, so if the driver of the vehicle does not match the name on the contract, that's when they will usually give me a call to see if it is, indeed, a misprint on the contract or if it is an unauthorized driver.

Q. Had you been called in this instance, on September 17th of [10] 2014, and asked to pull up this contract because a vehicle operated solely by Terrence Byrd was stopped by the Pennsylvania State Police and you looked at that agreement, is there anything in there that would show that he is an authorized driver of that vehicle?

A. If I was called, no, I would not see anything saying that he was an authorized driver.

Q. Now, the testimony in this case in the previous proceeding was that Mr. Byrd sat outside in the car, did not go in with Latasha Reed, did not present a driver's license, and obviously didn't sign anything. Does that add to your opinion that he was not an authorized driver?

A. Yes, sir.

MR. BEHE: That's all I have.

THE COURT: All right. Mr. Thornton.

MR. THORNTON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. THORNTON:

Q. The fact that he's not an authorized driver doesn't mean that Ms. Reed physically cannot loan him the car. It just means that he's broken your—she's broken your contract. Right?

A. The contract is then void.

Q. Right. And what happens at that point?

A. At that point we would recover the vehicle.

[11]

Q. But it's still possible for her, obviously, to loan it to somebody else if she wanted to do that?

A. Correct, sir.

Q. It would just be a violation of her agreement with your company?

A. Correct.

Q. The place where this was rented is 50 Route 46, Wayne, New Jersey. Is that one of your locations?

A. No, sir.

Q. Have you ever been there?

A. No, sir.

Q. You obviously weren't there on the day this car was rented, which was September 17th. You weren't at that location on that date, were you?

A. No, sir.

Q. Did you talk to anybody there?

A. No, sir.

Q. Do you know who the agent was who actually made this rental?

A. I do not. I just—it is notated at the bottom of the contract who checked out the vehicle by the name of Sachan in the bottom right.

Q. Can I see what—oh, right there. Okay. Thank you. And there's no way to tell from the signatures on there who the actual rental agent was, is there?

[12]

A. The Sachan is the rental agent that checked it out.

Q. Oh, okay. When you say "checked it out," that's the person who actually did the rental?

A. On the computer behind the counter, yes, sir.

Q. Okay. Now, did you speak to Sachan?

A. I did not.

Q. Is he still employed by your company?

A. I do not know.

Q. Do you have any idea on that day what exactly Sachan might have said to Latasha Reed?

A. As far as—

Q. If she could have someone else drive the car.

A. He would ask if there's any additional—anyone else that was going to be driving the vehicle. If Latasha replied with a yes, he would ask who that

individual was. If she replied with a no, then they would go through the rental process.

Q. You know that only from procedure, you don't know actually what happened on that day. Right?

A. Correct.

Q. You don't know if the place was crowded, do you?

A. No, sir.

Q. Do you know if Sachan was just about to get off work and wanted to get out quickly? Do you know that?

A. Do not know.

Q. Does it say what time on here that it was rented?

[13]

A. I believe at 10:26 a.m.

Q. Can you tell me where that is?

A. The top left under the pickup date and time, September 17th, 2014, 10:26 a.m. And it was returned September 20th, 2014, I believe at 4:00 p.m.

Q. Now, could that 10:26 have actually been the time that the reservation was for, or does it necessarily have to be the—

A. No, 10:26 would be the exact time the contract was printed out and checked out.

Q. And you obviously have no idea what the agreement was between Latasha Reed and Terrence Byrd regarding this car?

A. No, sir.

MR. THORNTON: We have no further questions, Your Honor.

MR. BEHE: I have no additional questions, Your Honor.

THE COURT: Thank you, Mr. Walther.

THE WITNESS: Thank you.

MR. BEHE: Thank you, Your Honor. That was the only witness on that particular point I was going to call.

THE COURT: All right. I assume then we—

MR. THORNTON: I have nothing else, Your Honor.

THE COURT: I assume we need to address the briefing schedule.

MR. BEHE: We have just this brief testimony. I'm sure it can be transcribed in short order, and we already have [14] a transcript from the earlier proceeding.

THE COURT: All right. We'll direct the transcription of this witness's testimony. And would you be filing the first brief?

MR. BEHE: I think that was the request of defense and that's—yes, I will be filing the first brief

THE COURT: Okay. Would 15 days following the receipt of the record be sufficient time?

MR. BEHE: That would be more than enough, Your Honor, yes.

THE COURT: All right. We'll request that, and then ten days to respond.

MR. THORNTON: That's fine, Your Honor.

THE COURT: Very good. All right. I think that concludes the matter. Thank you. Court is in recess.

(Whereupon, the proceedings were adjourned at 10:50 a.m,)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Lori A. Shuey, RMR, CRR, Federal Official Court Reporter, in and for the United States District Court for the Middle District of Pennsylvania, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-captioned matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated in Harrisburg, Pennsylvania, this 8th day of July, 2015.

/s/ Lori A. Shuey
Lori A. Shuey, RMR, CRR
Federal Official
Court Reporter

No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Fourth Amendment protects people from suspicionless searches of places and effects in which they have a reasonable expectation of privacy. Does a driver in sole possession of a rental vehicle reasonably expect privacy in the vehicle where he has the renter's permission to drive the vehicle but is not listed as an authorized driver on the rental agreement?

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not officially reported but may be found at 2017 WL 541405. Pet. App. 1a-8a. The district court's ruling on the suppression motion is not officially reported but may be found at 2015 WL 5038455. Pet. App. 9a-18a.

JURISDICTION

The Court of Appeals entered judgment on February 10, 2017. Pet. App. 1a. The petition for a writ of certiorari was timely filed on May 11, 2017, and granted on September 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

When a person's fiancée hands him the keys to her car and tells him he may use it, he reasonably expects privacy in the car. She has given him both possession and control over the car, and he reasonably believes that he can exclude strangers and the government from intruding upon his private personal and family possessions stored in the car. He accordingly has a reasonable expectation of privacy that entitles him to the Fourth Amendment's protection against suspicionless searches of the vehicle. The foundation of the driver's reasonable expectation of privacy—his possession and control of the car with his fiancée's permission—and the resultant constitutional protections do not materially change if it turns out the car is a rental and his fiancée did not include him on the rental agreement as an authorized driver.

Here, Terrence Byrd's fiancée Latasha Reed rented a car. She was one of over 115 million people who do so annually. *See* Canadean, *Car Rental in the US to 2020: Databook* 24 (Published Aug. 2016, Reference Code: TT1972DB). Reed signed a rental agreement that listed her as the authorized driver and stated in boilerplate terms that her spouse and coworkers were authorized to drive the vehicle as well. Because rental companies know and expect that relatives and other third parties frequently operate rental vehicles with the permission of the renter (even though not authorized to drive by the rental company), the rental agreement informed Reed that she would bear all risk of loss if an unlisted driver took the wheel.

Byrd's fiancée gave Byrd the keys to the car and permitted him to drive it even though he was not listed as a driver on the rental agreement. Byrd drove the car and stored personal possessions in the car's locked trunk that he expected would remain private. Later, state troopers pulled Byrd over for a claimed minor traffic violation. They then searched the entire vehicle and rummaged through bags of personal possessions in the locked trunk.

The government contends, and the Third Circuit held, that the government need offer no justification for this search. The Third Circuit said that because Byrd was not listed as a driver on the rental agreement, he had no cognizable property interest in the car and therefore had no objectively reasonable expectation of privacy in the car's locked trunk and no Fourth Amendment protection from a suspicionless search. That position finds no support in this Court's precedents, the history of the Fourth Amendment, general principles of property law, or the terms of the rental agreement.

This Court has consistently recognized that a reasonable expectation of privacy arises out of societal understandings of privacy, which look to a person's possession and measure of control over a place in assessing privacy rights protected by the Fourth Amendment. *See Minnesota v. Olson*, 495 U.S. 91, 99 (1990); *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *Katz v. United States*, 389 U.S. 347, 352 (1967); *Jones v. United States*, 362 U.S. 257, 259 (1960). As the sole occupant of the rental car with the renter's permission, Byrd plainly had the requisite possession and control to reasonably expect privacy.

The rental agreement's terms and conditions are all about risk of loss and have nothing to do with the Fourth Amendment rights of the driver. Notably, the rental agreement did not prohibit Byrd from possessing the rental car or from storing private possessions in its locked trunk.

Tying a reasonable expectation of privacy to compliance with an authorized-driver provision would encourage the police to pull over every rental car they see, ask for the rental agreement, and if the driver is unlisted, freely engage in a full search of the car with zero suspicion of a crime. That police act on such incentives is not speculation. In the Third Circuit, the police are well aware of this Fourth Amendment loophole. Indeed, the troopers here explained they pulled Byrd over in no small part because he was driving a rental car, and they told him they could search anywhere in his car because he was not listed on the rental agreement.

In light of the over 115 million annual car rentals in the United States, the Third Circuit's rule would result in the government exercising the very type of "sweeping power ... to search at large for [contraband]" that motivated the ratification of the Fourth Amendment. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). It would authorize the type of exploratory suspicionless searching and dragnet policing that the founding generation intended the Fourth Amendment to prevent. This Court should not "entrust[] to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor,

J., concurring). The decision of the Court of Appeals should be reversed.

STATEMENT OF THE CASE

Byrd's Fiancée Rents A Car And Permits Him To Drive It

Petitioner Terrence Byrd and his fiancée, Latasha Reed, have been together for over 17 years—longer than many marriages last. JA 180. They share a home. *Id.* And they have five children together. *Id.*

In September 2014, Reed rented a car at an Avis Budget (Budget) facility in Wayne, New Jersey.[1] Reed paid for the rental and signed a standard-form addendum to the rental agreement certifying, among other things, that she had a valid driver's license. JA 18-19; JA 20-25 (transcription). The agreement stated that "No additional drivers [are] allowed without prior written consent." JA 18. And the generic addendum provided that "the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form." JA 19. The addendum spells out in all capital letters the consequences of permitting an unauthorized driver to operate the vehicle: doing so "MAY RESULT IN ANY AND ALL COVERAGE

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[1] The rental agreement refers to a Budget rental car. JA 18. Budget is a subsidiary of the Avis Budget Group. At the certiorari stage, the parties referred to the rental company as Avis.

OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID" and the renter "BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES." *Id.*

State Troopers Pull Byrd Over For A "Left Lane" Traffic Violation

After leaving Budget, Reed gave Byrd permission to drive the car and handed him the keys. JA 182. Byrd first drove to their home. *Id.* Later he left their home in the rental car, with Reed's consent, to drive to Pittsburgh, where he and Reed were considering relocating. JA 181.

While on Interstate 81 in Pennsylvania, Byrd passed Trooper David Long, who was parked on the median observing passing traffic. JA 36. As Byrd passed, Trooper Long thought Byrd was driving "suspicious[ly]." *Id.* Long gave three reasons for his suspicion. First, Long noticed that Byrd was driving with his hands at the recommended "10-and-2" position on the steering wheel. JA 36, 63. Second, Long said that Byrd was sitting far back from the steering wheel with his seatback positioned in such a way that Long could not clearly see him. JA 36. Third, Long noted that Byrd was driving a rental car. JA 89; *see* JA 63. Based on these observations, which could describe anyone driving a rental car and suggest no criminal conduct, Long decided to follow Byrd's car. JA 64.

Long pulled into the left lane and joined a long line of cars. JA 93. It was the evening rush hour, and traffic in the left lane was moving below the 65-miles-

per-hour speed limit. JA 89-91, 98. At the front of the line was a slow-moving truck. Byrd was a few cars behind the truck, and Long was a few cars behind Byrd. JA 36. Over the next two minutes, the truck leading the cars in the left lane pulled into the right lane. *Id.* Byrd then passed the truck and continued in the left lane for an additional two tenths of a mile to pass another slow-moving truck in the right lane. JA 65, 87-88, 111.

Long pulled Byrd over. He posited that Byrd committed a traffic violation by failing to move into the right lane immediately after passing the first truck, which he maintained was a violation of a Pennsylvania law prohibiting driving in the left lane except when passing other vehicles. *See* 75 Pa. Cons. Stat. § 3313(d)(1) (requiring drivers to merge right unless passing or traveling faster than traffic flow). According to Long, it made no difference that Byrd was only in the left lane for two tenths of a mile: "every time that you pass a car, you have to immediately get over to the right." JA 106, 115-16.[2]

Troopers Detain Byrd For An Hour And Search The Trunk Of The Car Without Probable Cause

After Long pulled Byrd over, his partner, Trooper Martin, arrived at the scene. JA 38, 60-61. Long then approached Byrd's car. JA 68. Byrd handed Long a

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[2] In his police report, Trooper Long reported that Byrd had "traveled in the left lane for approximately 2 miles without overtaking another vehicle." C.A. App. 46. At the district court hearing, however, Long admitted that Byrd was in fact in the left lane for only two tenths of a mile. JA 88; *see also* JA 111.

temporary driver's license and the Budget rental agreement. JA 69, 112-14, 124-25. Byrd explained that his name was not on the rental agreement because a "friend" had rented the car. JA 69. The troopers did not inquire further and did not call the rental company. JA 48. Long returned to his police car to process the information on Byrd's license. JA 70.

Long verified Byrd's identity and confirmed that Byrd was a licensed driver. JA 37-38, 125. In the process of doing so, Long discovered that Byrd had an outstanding arrest warrant from New Jersey for a minor probation violation. JA 38. Long contacted New Jersey officials and learned that the warrant was "in-state only," meaning that New Jersey did not want Long to arrest Byrd and extradite him. *Id.*

For safety reasons, the troopers decided to move to a location further down the highway. JA 37. The troopers asked Byrd to drive the rental car (even though they knew he was not listed on the agreement) to the new designated location. JA 71. The troopers agreed that when Byrd drove to the safer location, he was in "complete control of his car." *Id.*

At the new location, the troopers discussed searching the car. They speculated that Byrd had marijuana in the vehicle, C.A. App. Vol. 3, 21:10-14,[3] even though they smelled no marijuana, JA 77. One

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[3] Volume 3 of the Court of Appeals' Appendix is a video recording from Trooper Long's patrol car of the stop and search of Byrd's car. Hereafter, the video recording is denoted by "C.A. App. Vol. 3" followed by the time as reflected on the video counter in minutes and seconds.

of the troopers stated that they could search the car without any grounds because Byrd "ha[d] no expectation of privacy" as "he [was] not on the renter agreement." C.A. App. Vol. 3, 21:40. Instead of searching immediately, however, the officers decided to seek Byrd's consent to a search of the car. JA 143.

The troopers asked Byrd to exit the vehicle, JA 136-37, and conducted a pat down, JA 145. The pat down revealed nothing. The officers then issued Byrd a written warning for driving in the left lane. JA 45.

With the warning done, the troopers "moved on to additional questions." *Id.* They peppered Byrd with questions about criminal activity. Is "anything illegal in the car?" C.A. App. Vol. 3, 41:56. Do you have "marijuana in the center console"? C.A. App. Vol. 3, 42:00. C.A. App. Vol. 3, 42:02. Do you "smoke weed"? C.A. App. Vol. 3, 42:16. Three times, Byrd said no. C.A. App. Vol. 3, 41:56-2:20.

The troopers then asked for permission to search the car. JA 77; C.A. App. Vol. 3, 42:38. Byrd responded that he might have a "blunt" in the car. JA 77. The troopers replied that they were not concerned about that. C.A. App. Vol. 3, 43:00. Byrd said he had nothing else. One of the troopers then asserted without foundation, "so you're giving us permission to search your car." C.A. App. Vol. 3, 43:21. Byrd asked if he could simply retrieve the blunt because "I don't

want you to search" the car. C.A. App. Vol. 3, 43:35; Pet. App. 12a.[4]

Nonetheless, the troopers proceeded to search the car. They told Byrd they did not need his consent because, among other things, he wasn't on the rental agreement and therefore had "no expectation of privacy" protected by the Fourth Amendment. C.A. App. Vol. 3, 44:17; *see also* JA 48 (Long testifying: "I may have actually explained to him that I didn't need his consent because he's an unauthorized driver of the vehicle. I may have explained to him I don't need his consent."). Long later explained that the "consent" consisted solely of Byrd's offer to retrieve the blunt; "after that, he never gave ... consent." JA 162. Long also testified that it was standard procedure to secure consent with a written-consent form. JA 47. But despite having forms at the scene, the troopers never asked Byrd to sign one. *Id.*

The troopers searched the passenger compartment of the car and found no marijuana or any other evidence of a crime. JA 147. They then opened the locked trunk and found a large, opaque laundry bag. C.A. App. Vol. 3, 48:30-35. They emptied the bag and found a flak jacket and heroin. C.A. App. 47.

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[4] Byrd's answers over the passing traffic in this part of the video are difficult to hear. With the audio slowed down and the treble reduced, however, Byrd's responses can be clearly understood.

The District Court Rules That Byrd Had No Reasonable Expectation Of Privacy In The Rental Car

Byrd was initially charged in Pennsylvania state court. Those charges were dismissed after a federal grand jury returned a two-count indictment charging Byrd with distributing and possessing heroin with the intent to distribute, 21 U.S.C. § 841(a), and possession of body armor by a prohibited person, 18 U.S.C. § 931(a)(1). C.A. App. 27-29.

Byrd moved to suppress the evidence obtained from the search under the Fourth Amendment because the troopers lacked probable cause to search the car's trunk. C.A. App. 30-36 (motion to suppress). The government contended that Byrd should not be permitted to raise a Fourth Amendment challenge to the search because, as an unlisted driver, he had no reasonable expectation of privacy in the rental car, and therefore the Fourth Amendment simply did not apply.

At the suppression hearing, Byrd testified that Reed had rented the car for them to share. JA 180. He explained that he and Reed lived together and "[were] about to get married" and that "[s]he is the mother of ... [his children]." *Id.* He also explained that they "shared vehicles all the time." JA 181.

The district court denied the motion to suppress. Applying Third Circuit precedent, the court ruled that Byrd lacked a reasonable expectation of privacy in the rental car because he "was merely given permission by Reed to drive the car," "he was not a party to the

rental agreement," and "he did not pay for the rental." Pet. App. 13a. Byrd then entered a conditional guilty plea, preserving the right to appeal the denial of his suppression motion. C.A. App. 221-23. The district court sentenced Byrd to ten years in prison. C.A. App. 13-14.

The Third Circuit Agrees That Byrd Had No Reasonable Expectation Of Privacy In The Rental Car

The Third Circuit affirmed. Pet. App. 1a-8a. Following its earlier decision in *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011), the court held that Byrd had no reasonable expectation of privacy in the rental car because the rental agreement did not authorize him to drive it.

In *Kennedy*, the Third Circuit held that drivers of rental cars who are not listed on the rental agreement generally have no right under the Fourth Amendment to challenge a vehicle search. The court reasoned that while listed drivers expect privacy because they can exclude others from accessing the car, unlisted drivers have "no cognizable property interest ... and therefore no accompanying right to exclude." *Id.* at 165. Unlike someone who borrows a friend's or relative's car with permission, the court concluded that "an individual who borrows a rental car without the permission or knowledge of the owner ... deceives the owner of the vehicle while increasing the risk that the property will be harmed or lost." *Id.* The court did not explain what increasing the risk of harm to a rental car had to do with the privacy interests society recognizes as reasonable. Nor did the court explain why the

rental company's authorization to drive a rental car was necessary for a person using the car with the renter's permission to have the right to exclude others.

Relying on *Kennedy*, the Third Circuit upheld the district court's denial of Byrd's suppression motion. Pet. App. 8a.

SUMMARY OF THE ARGUMENT

I. A. The Fourth Amendment's "central concern" is to constrain "police officer[s'] unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). A person may assert his Fourth Amendment right to be free from unjustified searches if that person has an objectively reasonable expectation of privacy in the area searched. *See Rakas v. Illinois*, 439 U.S. 128, 140 (1978). A reasonable expectation of privacy does not require ownership of the area searched. *Id.* Rather, this Court looks to the degree of possession and control over the area searched. *Id.* at 143 n.12; *see Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (overnight guest has reasonable expectation of privacy in friend's duplex); *Katz v. United States*, 389 U.S. 347, 352 (1967) (phone booth patron has reasonable expectation of privacy in a phone booth); *Jones v United States*, 362 U.S. 257, 259 (1960) (man with key to friend's apartment and who spent a night there has reasonable expectation of privacy in apartment). Society recognizes that a person with possession and control over a space has a reasonable expectation of privacy because the person can exclude others from the space and therefore reasonably believes that his

personal effects stored there will not be open to the public or governmental inspection. *Olson*, 495 U.S. at 99.

In this case, Byrd had possession and control over the rental vehicle, with the renter's permission, and could be confident that strangers could not access the contents of the car's locked trunk. Thus, when the troopers invaded the locked truck and rummaged through his possessions, without consent, they violated Byrd's reasonable expectation of privacy.

B. Byrd's expectation of privacy in the rental car is all the more reasonable because his fiancée, the mother of his five children, allowed him to use it. This Court has frequently emphasized the importance of the family, and the privacy interests inherent in the family unit. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Society recognizes that family members expect the contents of a shared family car to remain private and free from unwarranted intrusion. At a minimum, a person reasonably expects privacy in a car rented by a close family member. Thus, Byrd's close familial relationship to the renter further establishes his reasonable expectation of privacy in the car.

II. A. That Byrd was not listed as an approved driver on the rental agreement has no bearing on his reasonable expectation of privacy in the locked trunk of his fiancée's rental car, which he possessed and controlled with her permission at the time of the search. Reasonable expectations of privacy do not generally depend on the terms of commercial contracts because such contracts are not intended to reflect, effectuate, or alter societally recognized privacy interests. Thus,

this Court has recognized that neither a hotel's right to enter a guest's room nor a landlord's right to inspect a tenant's apartment on demand changes the reasonable expectation of privacy society recognizes in both places. *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring); *Stoner v. California*, 376 U.S. 483, 489 (1964). Such commercial contracts serve business purposes wholly extraneous to privacy considerations.

The particular authorized-driver provision at issue here is no exception. Rental companies include authorized-driver provisions in rental agreements to collect additional fees and to shift liability for damage to the vehicle to the renter and away from the rental company. Contractual terms regarding allocation of risk of loss do not purport to have any bearing on a driver's expectation of privacy. Further, the rental agreement did not prohibit Byrd from possessing the car or from excluding others from it.

The mere fact that Reed may have breached a rental contract term by allowing Byrd to drive the car also did not strip Byrd of his reasonable expectation of privacy in the locked trunk. The breach did not turn Byrd into a car thief and make his possession "wrongful." *Rakas*, 439 U.S. at 141 n.9. Moreover, widespread noncompliance with authorized-driver provisions is an open secret. Rental companies expect that unlisted drivers will drive their vehicles, which is why their agreements often specify that the renter will carry greater risk of loss when an unlisted driver operates the vehicle. A rule that would render expectations of privacy in rental cars unreasonable when a term of the rental contract is breached would mean

that virtually no rental-car driver has a reasonable expectation of privacy in the car, as rental agreements are full of material terms that renters frequently breach. And such a rule would inescapably call into question the privacy expectations that apartment dwellers have in their homes.

B. The Third Circuit's rule creates incentives for police officers to stop all rental cars so that they can check whether the driver is on the rental agreement and then proceed to search every inch of the car without any suspicion or justification, if the driver is not listed. Giving police carte blanche to run this gambit is contrary to the Fourth Amendment's fundamental purpose of preventing police officers from having "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. It would also have far-reaching effects, which will only increase as rental cars and car sharing become more and more prevalent.

C. A rule that would limit the scope of the Fourth Amendment's protections based on the terms of standard-form rental contracts would also fail to provide clear and administrable guidance to trained officers in the field. Applying such a rule would require an officer in the field to have access to the full set of terms and conditions governing the rental transaction, to have sufficient legal training to determine the legal ramifications of those terms and conditions, and to determine whether the particular driver qualifies under one of the categories of authorized drivers specified in the agreement or under background state law. But the officer will often not be able to do any of these

things at the scene. The far clearer rule is that a person driving the car, with the permission of the owner or renter, has an objectively reasonable expectation of privacy in a vehicle.

III. Byrd's cognizable property interest in the rental car further supports reversal of the Third Circuit's ruling. When Reed rented the car, she became a bailee and obtained property rights in the car, including the right to possess the car and exclude others from it. Similarly, when Byrd borrowed the car from Reed with her permission, he became Reed's bailee and obtained a bailee's accompanying property rights. That property interest afforded Byrd Fourth Amendment protection against unjustified searches of the car like the one that occurred here.

ARGUMENT

I. Byrd May Challenge The Search As Unlawful Because He Had A Reasonable Expectation Of Privacy In The Rental Car.

The Fourth Amendment grants the people a right to be free from unreasonable searches and seizures by law enforcement. U.S. Const. amend. IV. The Amendment guards against the founders' abhorrence of a government empowered to conduct general suspicionless searches. As this Court has recognized, the Amendment "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants ... [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8

(1977). The Amendment's "central concern" is thus to constrain "police officer[s'] unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009).

In today's world, one of the most basic and ubiquitous "effects" is the automobile. *See United States v. Jones*, 565 U.S. 400, 404 (2012); *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). This Court has emphasized that an "individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Prouse*, 440 U.S. at 662. To the contrary, "a motorist's privacy interest in his vehicle" is "important and deserving of constitutional protection." *Gant*, 556 U.S. at 345 (citation omitted).

The Amendment's warrant and probable cause requirements shield individual privacy from arbitrary exercises of intrusive executive power by requiring the government to justify searches and seizures. To search an automobile, an officer typically does not need a warrant, but must have probable cause to believe the vehicle contains evidence of criminal activity. *United States v. Ross*, 456 U.S. 798, 824 (1982). Further, the officer must limit the search to the areas of the vehicle where "there is probable cause to believe that [the object of the search] may be found." *Id.* This ensures that a search remains "tailored to its justifications" and "will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

The troopers in this case conducted just such an "exploratory" search of the car, including the locked trunk, without a warrant or probable cause. Indeed, the government did not even argue to the district court or to the Court of Appeals that the search of the trunk was justified by probable cause.

The government, however, is unperturbed. It contends that it need offer no justification at all for the search because Byrd did not "'personally ha[ve] an expectation of privacy in the place searched.'" BIO at 5 (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). More generally, the government posits that a person driving a rental car has no reasonable expectation of privacy in the car, if the rental agreement restricts driving to listed drivers and the person driving, with the renter's express permission, is not listed. In the government's view, the rental company's decision to include a contractual provision designed to shift the additional risk of loss from the company to the renter means that an unlisted driver has no reasonable expectation of privacy and that the police, therefore, can undertake suspicionless searches of the entire car.[5]

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[5] Before *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court analyzed an individual's ability to claim Fourth Amendment protections under the rubric of "standing." In *Rakas*, the Court clarified that the inquiry "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing," *id.* at 140, and that ultimately "[t]he inquiry under either approach is the same," *id.* at 139. Subsequent decisions have therefore asked whether a defendant had a "legitimate expectation of privacy" in the area searched. *Carter*, 525 U.S. at 88. "Standing," however, continues to be used as a shorthand for having a sufficient interest to challenge a search or seizure. *See,*

That position finds no support in this Court's precedents or in societal expectations of privacy. It is, instead, an unconstitutional power grab that would permit suspicionless "exploratory rummaging" with respect to a large swath of automobiles traveling on today's highways, *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion), exactly the kind of untrammeled exercise of government authority that the Fourth Amendment was intended to constrain.

A. Byrd had a reasonable expectation of privacy in the rental car because he had possession and control of the car with the renter's permission.

This Court has recognized that having possession of and control over a closed space establishes an objectively reasonable expectation of privacy protected by the Fourth Amendment. When the troopers pulled Byrd over, he had his fiancée's express permission to use the car, and he had sole possession and control over it. When the troopers began rummaging through the locked trunk, they invaded *Byrd's* objectively reasonable expectation of privacy and impinged upon *his* Fourth Amendment rights.

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e.g., *Arizona v. Johnson*, 555 U.S. 323, 332 (2009). However phrased, Byrd may challenge the search in this case because it contravened *his* privacy interests and infringed upon *his* Fourth Amendment rights.

1. Possession and control over a closed space establishes a reasonable expectation of privacy.

The touchstone for the protections the Fourth Amendment provides is whether a person has an objectively reasonable expectation of privacy in the area or thing searched. *California v. Greenwood*, 486 U.S. 35, 39 (1988).[6] An expectation of privacy is objectively reasonable if it has a source in "understandings that are recognized and permitted by society." *Carter*, 525 U.S. at 88.

This Court has consistently recognized that a person who lawfully possesses and exercises control over a closed space "will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude" others, whether or not he has a property right in the space. *Rakas*, 439 U.S. at 143 n.12.[7] That reflects how society thinks about privacy. A person who has control over a space and can exclude most others has an objectively reasonable belief that his effects will not be open to public scrutiny or subject to suspicionless searches by the government.

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[6] The government has not contended that Byrd had no subjective expectation of privacy—nor could it. Byrd "took normal precautions to maintain his privacy" in the car by storing his possessions in the trunk and out of plain view. *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

[7] As discussed below (*infra* 35-37), there is a limited exception to this rule where the property is stolen. *See Rakas*, 439 U.S. at 141 n.9. Violating the terms of a rental agreement does not constitute theft.

This Court's cases illustrate the centrality of possession and control to the privacy analysis. In *Jones v. United States*, 362 U.S. 257 (1960), this Court held that a person, who had a key to a friend's apartment, who was not on the lease, and who slept in the apartment for a night, reasonably expected privacy in the apartment. *Id.* at 259. It made no difference that the visitor had no "possessory interest ... greater than ... an 'invitee or guest,'" *id.* at 263, or that his host was the renter, and not the owner of the apartment, *see* Brief for the United States at 26, *Jones v. United States*, 362 U.S. 257 (1960), 1959 WL 101485 (noting that the host was a "tenant"). All that mattered was that the visitor had some measure of "dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149 (discussing *Jones*, 362 U.S. at 259).

The Court applied the same approach in *Minnesota v. Olson*, 495 U.S. 91 (1990). There, this Court held that the overnight guest had a legitimate expectation of privacy in a duplex. It did not matter that the guest "was never left alone in the duplex or given a key." *Id.* at 98. Instead, what mattered was that he reasonably expected that "he and his possessions w[ould] not be disturbed by anyone but his host," *id.* at 99, and he "w[ould] have a measure of control over the premises" when the host was away, *id.*

The same governing principles apply beyond the residence as well. A person in a shared office space has a reasonable expectation of privacy in the space because he reasonably believes he "w[ill] not be disturbed except by personal or business invitees." *Mancusi v. DeForte*, 392 U.S. 364, 369-70 (1968). So too a

person reasonably expects privacy in a public telephone booth, *Katz v. United States*, 389 U.S. 347, 352 (1967), and in the portions of a taxi within a passenger's control, *id.* at 351-52; *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960). In each of these scenarios, a person reasonably expects privacy in the space over which he has possession and control because he can prevent strangers from accessing it.

To confer a reasonable expectation of privacy, one's possession and control over the space may be limited and need not be exclusive or "absolute." *Mancusi*, 392 U.S. at 370. The overnight guest reasonably expects privacy in his host's home, even though the host has superior legal dominion over the home. *See Rakas*, 439 U.S. at 149 (discussing *Jones*, 362 U.S. at 259); *Olson*, 495 U.S. at 99 ("That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy."). And a person "enjoys Fourth Amendment protection in his home ... even though ... his landlord [may] ha[ve] the right to conduct unannounced inspections at any time." *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring).[8]

The limited circumstances in which this Court has found a person's expectation of privacy to be objectively unreasonable further prove the point—that

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[8] *See also Olson*, 495 U.S. at 99-100 ("If the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto.").

reasonable expectations of privacy generally turn upon the concepts of possession and control. In *Rakas*, for example, this Court held that mere passengers in an automobile without a close relation to the driver lacked an objectively reasonable expectation of privacy in the portions of the car that passengers ordinarily do not access—the "locked" glove compartment and the area under the seat. 439 U.S. at 148-49. Likewise, in *Carter*, an individual, who visited a house for only a few hours to conduct business and who did not know the owner, could not reasonably expect privacy in the house. 525 U.S. at 90-91. And in *Rawlings*, a defendant could claim no objectively reasonable privacy interest in the purse of a woman he barely knew, which he did not possess, and from which he could not exclude others. 448 U.S. at 104-05.

2. Byrd had sole possession and control over the rental car when the troopers searched it.

Byrd's possession and control of his fiancée's rental car, which he drove with her permission, afforded him a reasonable expectation of privacy in the car not materially different from the houseguests in *Jones* and *Olson*. Just as the overnight guest in *Jones* "had permission to use the apartment," "had a key to the apartment," and "kept possessions in [it,]" *Rakas*, 439 U.S. at 149, Byrd had the keys to and the renter's permission to drive the car; he kept possessions in the car; and he exercised control over the car before the search. The troopers acknowledged as much when midway through the stop they had Byrd drive the car to a nearby location and conceded that Byrd was in "complete control of his car." JA 71. Byrd was nothing

like the "casual visitor" who just happens to be in an area he's never previously been "one minute before a search ... commences." *Rakas*, 439 U.S. at 142.

Indeed, Byrd's expectation of privacy is even more reasonable than the privacy expectations held reasonable in *Jones*, *Olson*, *Mancusi*, and *Katz*. In *Jones*, the defendant had far less control over the area searched. Jones's friend could have surprised him by coming home early and with others in tow. Likewise, the defendants in *Olson* and *Mancusi* shared the searched premises with others who came and went. And the phone booth did not necessarily protect Katz from others who might open the door and enter.

Unlike the defendants in those cases, all of whom nevertheless had constitutionally recognized privacy interests, Byrd could be confident that others would not enter the space in question without his permission because he had sole possession of the car with the permission of his fiancée (the renter). If a stranger attempted to enter, he had the keys and could keep them from doing so, giving him "dominion and control over" the car before the search. *Rakas*, 439 U.S. at 149.

It makes no difference in this context that Byrd claims a privacy interest in a car and that some of these cases (*Jones* and *Olson*) involved homes. "A search... of an automobile is a substantial invasion of privacy," *United States v. Ortiz*, 422 U.S. 891, 896 (1975) (punctuation omitted), and the Constitution prohibits suspicionless searches of cars as well as homes, *Ross*, 456 U.S. at 824. People plainly expect

privacy in the sealed and locked compartments of automobiles that are hidden from plain view and inaccessible to others. *Cf. Rakas*, 439 U.S. at 154 (noting that mere passengers rarely access sealed compartments). Indeed, acknowledging the substantial privacy that society expects in the trunk of a car, car manufacturers create special "valet keys" that start the engine, but do not open the trunk. Under the circumstances, Byrd had dominion and control and the right to exclude, and thus enjoyed a reasonable expectation of privacy protected by the Fourth Amendment.

B. Byrd's expectation of privacy in the rental car is all the more reasonable because his fiancée rented it and allowed him to use it.

Byrd's possession and control of the car with the renter's permission is sufficient to establish his reasonable expectation of privacy in the car. But his expectation of privacy is underscored here by his close familial connection to the renter. Byrd was not driving a car rented by a stranger or a mere acquaintance; he was driving a car rented by his fiancée, the mother of his five children, and with her permission.

This "Court has frequently emphasized the importance of the family" in society. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *Id.* (citations omitted). And from the common law to the present, it has informed the scope

of who is entitled to claim Fourth Amendment protection in a place.

Since the founding era, courts have recognized that family members may share in each other's expectations of privacy. *See Carter*, 525 U.S. at 95-96 (Scalia, J., concurring) (discussing *Oystead v. Shed*, 13 Mass. 520 (1816)). That acknowledgement respects the sanctity of the "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). That sanctity also extends to the family car, which today plays a central role in the lives of many Americans. *Prouse*, 440 U.S. at 662 ("Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel."). People reasonably expect the privacy inherent in their family unit to extend to their vehicle, especially the closed and locked spaces such as the glove compartment and trunk. When immediate family members share a car, they share that expectation of privacy in the vehicle as well.

Rental cars are no different. Families rent vehicles, often for sustained periods of time, in a wide range of circumstances. They can put rental cars to all the same uses as their privately owned vehicles. A family may rent a car, for example, when an owned vehicle is being repaired or while the family is on vacation. And when they do so, society generally accepts that they are entitled to privacy in that shared space to the same degree as if they owned the car or leased it on a long-term basis. Thus, a driver's close familial

connection to the renter supports finding that the driver reasonably expected privacy in a rental car. *See, e.g., United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001) (that an unlisted driver "was given the vehicle by his wife" is relevant to whether he had a reasonable expectation of privacy in a rental vehicle).

Byrd's close familial relationship to the renter further establishes his reasonable expectation of privacy in the car. Latasha Reed, Byrd's fiancée and the mother of their five children, rented the car for their shared use. JA 179-81. Society recognizes that family members expect the contents of a shared family car to remain private and free from unwarranted intrusion. Indeed, the government presumably would admit that Byrd would have enjoyed full Fourth Amendment rights in a vehicle owned by Reed, given his close familial relationship to her. Its insistence that Byrd had no Fourth Amendment rights here then stems *solely* from the fact that Reed rented the car and did not own it. That position is wholly insensitive to the "private realm of family life," which is too important to turn on whether a family rents a car or owns one.

II. The Authorized-Driver Provision Did Not And Should Not Render Byrd's Expectation Of Privacy In The Locked Trunk Of The Rental Car Objectively Unreasonable.

The Court of Appeals reached the wrong outcome in this case because it focused upon the authorized-driver provision in the rental company's standard-form rental agreement, instead of the core privacy

concepts of possession and control. Without explanation, that court concluded that a driver who is not listed in the rental agreement "has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude." *Kennedy*, 638 F.3d at 165; *see* Pet. App. 8a. And on the basis of that initial conclusion, the Court of Appeals held that an unlisted driver necessarily lacks an objectively reasonable expectation of privacy in a rental car.

The Court of Appeals misapprehended both the content of the rental agreement and its significance to the privacy analysis.[9] This Court has never pinned its determination of whether particular expectations of privacy are reasonable to the terms of a private agreement. And for good reason: standard-form commercial contracts rarely, if ever, are meant to reflect and effectuate societally recognized privacy interests. Indeed, the agreement here did not purport to prohibit an unlisted party from *possessing* the car or *excluding others* from it, which is what matters for the Fourth Amendment.

Nor does the mere fact that a renter breaches the rental agreement by allowing an unlisted person to drive the car strip the driver of an otherwise reasonable expectation of privacy. The rental companies know and expect that unlisted persons will drive rental vehicles. That is why the agreement addresses that situation and makes clear that the renter incurs the risk of loss when an unlisted driver operates the vehicle.

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[9] As explained *infra* § III, the Court of Appeals also erred in assuming that Byrd had no property rights in the rental car.

Finally, a rule that would base the Fourth Amendment analysis on the terms of standard-form rental contracts would create incentives for police officers to engage in general searches of rental cars. And it would fail to provide clear and administrable guidance to trained officers in the field.

A. Byrd's reasonable expectation of privacy in the rental car did not depend on compliance with the authorized-driver provision.

1. The terms of private agreements generally do not negate otherwise objectively reasonable expectations of privacy.

This Court has never held that the terms of a private agreement, setting out the terms of a commercial transaction, negate an otherwise objectively reasonable expectation of privacy under the Fourth Amendment. That is because the terms of boilerplate commercial contracts typically serve business purposes wholly extraneous to privacy considerations.

A hotel, for example, may opt to provide in its generic terms and conditions that it retains the right to access a guest's room for safety reasons or to provide services to guests. Despite such a provision, a guest retains his reasonable expectation that neither the public nor the police will intrude upon his private effects without justification while he stays at the hotel. *See Stoner*, 376 U.S. at 490 ("No less than a tenant of a house, or the occupant of a room in a boarding house ... a guest in a hotel room is entitled to constitutional

protection against unreasonable searches and seizures.... That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.").

Similarly, a tenant of a rental apartment maintains a reasonable expectation that his residence will be free from unwarranted third-party intrusion "even though ... his landlord [may] ha[ve] the right to conduct unannounced inspections at any time." *O'Connor*, 480 U.S. at 730; *see also Chapman v. United States*, 365 U.S. 610, 617-18 (1961). And there is no reason to believe this Court would have reached a different result in *Katz* if the phone company had posted terms of use prohibiting use of its phone booth for placing gambling bets. A reasonable person's expectation of privacy generally does not depend on the terms of commercial contracts. It instead rests on "longstanding social custom." *Olson*, 495 U.S. at 98.

2. Authorized-driver provisions have nothing to do with reasonable expectations of privacy in rental cars.

Nothing about the specific rental agreement in this case bears on a driver's reasonable expectation of privacy. Rental agreements are about allocation of the risk of loss, not privacy. And the rental agreement in this case did not bar Byrd from possessing the car and excluding others from it.

a. Rental-car contracts generally, and authorized-driver provisions specifically, have nothing to do with the privacy interests that a reasonable person has

when driving a rental car with the permission of the renter. As discussed (*supra* 21-24), a driver's reasonable expectation of privacy in a car comes from society's recognition that people expect privacy in places within their control, sheltered from public view. That expectation is no different for an unlisted driver, who controls the car and stores private possessions in the car's locked compartments. Unlisted drivers are commonplace. People take the wheel of rental cars they did not anticipate driving for myriad reasons every day. They may do so if the renter has had one too many drinks; if the renter unexpectedly tires or falls ill; if the renter does not feel comfortable driving in the dark or in the rain; or if the parent who rented the car is sick and cannot drive her child to school that morning. When an unlisted driver takes the wheel under those conditions or at any other time with the renter's permission, that driver exercises the same possession and control over the car that society generally regards as sufficient for her reasonably to expect privacy in the vehicle.[10]

Rental companies craft their terms and conditions to protect their capital investment in their vehicles, minimize risk of loss and insurance costs, and collect additional fees. *See* JA 19 (linking authorized-driver

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[10] A person may also be an unlisted driver simply because he was confused as to whether a person in a long term cohabitation/engagement relationship would be considered a "spouse" under the rental contract. Courts in New Jersey have treated cohabiting couples as having similar rights as married couples. *In re Estate of Roccamonte*, 808 A.2d 838, 842 (N.J. 2002) ("[W]e recognize[] that unmarried adult partners, even those who may be married to others, have the right to choose to cohabit together in a marital-like relationship ... .").

provision and insurance coverage). They do not concern themselves with—let alone attempt to regulate—the privacy of a third-party driver.

Authorized-driver provisions, like the one here, are representative of the terms of rental contracts more generally. The rental companies *know* that it is commonplace for unlisted drivers to operate a rental vehicle. Numerous courts have recognized that an unlisted driver operating a rental vehicle is a "common scenario." *Thrifty Car Rental, Inc. v. Crowley*, 677 N.Y.S.2d 457, 459 (Sup. Ct. Albany Cty. 1998). Indeed, it is such a common occurrence that courts have held it to be "reasonably foreseeable," *Mahaffey v. State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996), and "exceedingly" likely. *Motor Vehicle Accident Indemnification Corp. v. Cont'l Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 184 (N.Y. 1974); *see also Fin. Indem. Co. v. Hertz Corp.*, 38 Cal. Rptr. 249, 252, 254 (Cal. Dist. Ct. App. 1964) (rental companies and others have no "reasonable basis for believing that" these sorts of generic restrictions will necessarily "be complied with").

Because they know and expect unlisted drivers to operate rental vehicles, rental companies include provisions addressing risk of loss in that context. Here, for example, the agreement anticipates the possibility of an unlisted driver and spells out in all caps that permitting an unlisted driver to drive "MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID" and the renter "BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES." JA 19. Rental

companies may have sound business justifications for including such a provision in their standard-form terms and conditions. But the inclusion of such a provision does not transform the vehicle into a Fourth-Amendment-free zone whenever an unlisted driver takes the wheel.

b. The Third Circuit reasoned that unlisted drivers lack a reasonable expectation of privacy in rental cars because persons who are not listed as drivers lack a contractual right to possess the car and exclude others from it. Pet. App. 8a (citing *Kennedy*, 638 F.3d at 165). That is irrelevant to Byrd's reasonable expectation of privacy for the reasons just explained, *supra* 32-34, but it is also not what the agreement says. The authorized-driver provision here limits only the persons who are "permitted to *drive* the vehicle." JA 19 (emphasis added). It nowhere prohibits a third party from possessing, storing possessions in, or excluding others from the vehicle—in other words, the uses of a rental car that people typically associate with privacy. *Supra* 21-24.

With the renter's permission, people expect freedom to ride in the vehicle; sit in it, alone, for as long as they want; retreat to the vehicle to have a personal phone call they don't want others to overhear; store private effects in the vehicle; and even, if need be, sleep in it. And when people have the right to do these things, they also reasonably expect the right to exclude others. Had Byrd elected to sit in the car listening to the radio while Reed went into a store to do some shopping, he could of course have denied entrance to any loiterer in the parking lot who approached the car seeking to get in. Byrd would have

had "dominion and control" over the car and he "could [have] exclude[d] others from it." *See Rakas*, 439 U.S. at 149. The fact that he was not authorized by the contract to *drive* the car is beside the point.

The rental agreement accordingly did not prohibit Byrd's possession and control of the car with the renter's permission. That possession and control gave rise to an objectively reasonable expectation of privacy protected by the Fourth Amendment.

3. Breach of a rental agreement does not terminate one's reasonable expectation of privacy in a rental car.

This Court has recognized only one circumstance where a person who has possession of and control over a closed space lacks a reasonable expectation of privacy—where the person stole the property. *See Rakas*, 439 U.S. at 141 n.9. That exception has no application here. The unlisted driver who takes the wheel of a rental car with the renter's permission is not a car thief. He does not commit a theft merely because the rental agreement prohibits unlisted driving. *See Smith*, 263 F.3d at 587. Indeed, after learning that Byrd was an unlisted driver, the troopers at the scene even permitted him (indeed, directed him) to drive the rental car further down the highway. *Supra* 8.

A rule that the Fourth Amendment's protections cease the moment that a rental agreement is breached would naturally extend to other terms in the rental agreement regarding operation of the vehicle.

Boilerplate rental contracts include numerous restrictions on use that rental-car drivers frequently ignore. For example, in some rental agreements, the very same paragraph that prohibits unlisted driving also provides that driving or operating the "car while using a hand-held wireless communication device or other device that is capable of receiving or transmitting telephonic communications, electronic data, mail or text messages shall be deemed a breach of this contract." Budget, *Terms and Conditions United States & Canada* 10 (Apr. 28, 2017), http://tinyurl.com/y8wqrnlu (Budget Agreement). Under the language of that provision, the renter breaches the contract, if the driver (even the listed driver) uses his smartphone to run Google Maps to obtain directions while driving. Likewise, it would violate that agreement to drive on a gravel road. *Id.* (prohibiting operation of the rental car "on unpaved roads"). And just as with the authorized-driver provision here, that agreement makes clear that these contractual violations result in the renter bearing any additional risk of loss. *Id.* at 9-10. Such risk-allocation provisions do not turn a driver violating the technical terms of a private agreement into a car thief.

If the breach of the rental agreement is what matters, then there is no significant distinction between an unlisted driver, on one hand, and a renter who answers a phone call without the help of a hands-free device, on the other. In either case, the rental agreement is materially breached and the rental company can, at least in theory, terminate the contract. But no one would think that such a breach, standing alone, affects whether a person's expectation of privacy in the car is objectively reasonable. An authorized driver

surely does not lose his reasonable expectation of privacy in a rental car simply because he forgets to wear his seatbelt or inadvertently pumps the car with diesel fuel in derogation of the rental contract's conditions. *See United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014) (observing that the rental agreement in that case made it a material breach to fail to wear a seatbelt or to fill the car with the wrong kind of fuel).

Further, a rule tying privacy interests to compliance with the terms of a boilerplate commercial contract will have far-reaching consequences, and cannot be cabined to the rental-car context. Like rental-car contracts, residential leases can be full of material boilerplate provisions that tenants frequently disregard. An apartment lease might prohibit pets, for example, or it might prohibit subletting. Violating those provisions may give the landlord the right to terminate the lease and repossess the space. But no court would believe that a tenant's expectation of privacy in her home is unreasonable simply because she has taken in a Yorkshire terrier or that a subletter has no reasonable expectation of privacy in his home because the lease prohibits subletting. And the reason is that neither of these material breaches of the lease agreement has anything to do with whether a person can reasonably expect privacy from unexpected and unwanted intrusions into the apartment.

So too with the rental car. When a driver places his effects in the trunk of a rental car and gets behind the steering wheel, the driver borrowing the car with the permission of the renter reasonably believes that the items placed in the locked trunk are safe from prying eyes and the intrusions of the general public and

the police. The breach of the rental agreement in no way undermines that reasonable expectation of privacy.

B. Basing the scope of the Fourth Amendment on rental agreements creates incentives to stop rental cars and engage in suspicionless searches.

Linking reasonable expectations of privacy in rental cars to compliance with the authorized-driver provisions of rental agreements would skew police incentives toward conducting widespread suspicionless searches of rental cars. If unlisted drivers have no Fourth Amendment protection in the car, law enforcement officers would have a significant incentive to pull over rental cars whenever the driver commits a technical traffic infraction; check whether the driver is on the rental agreement; and then, if it turns out the driver is unlisted, proceed to search every inch of the car without probable cause to believe that the car contains evidence of a crime. That conduct mirrors the type of suspicionless "search[es] at large for [contraband]" that the founding generation intended the Fourth Amendment to prohibit. *Chadwick*, 433 U.S. at 7-8.

Authorizing such suspicionless searches of rental cars will have far-reaching effects. Even apart from the increasingly popular car-sharing services, like Zipcar, traditional rental-car companies alone have over 2.3 million cars in their fleets. *See* Auto Rental News, ***2016 U.S. Car Rental Market***, http://tinyurl.com/loeucnj. In 2015 alone, people rented cars over ***115 million*** times. *See* Canadean, *Car Rental in*

the US to 2020: Databook 24 (Published Aug. 2016, Reference Code: TT1972DB).

The facts of this case illustrate all too starkly that each of those 115 million car rentals may be targeted for suspicionless searches if the Third Circuit's rule that unlisted drivers have no Fourth Amendment rights is affirmed. The troopers admitted that Byrd's driving a rental car was one of the reasons that they followed him and pulled him over. Indeed, they explained that, with their training and experience, they could identify the car as a rental car from prominent barcode stickers that they observed and knew to look for. JA 63. And the troopers admitted that they were well aware of the Third Circuit's rule. They knew that if Byrd was not listed on the rental agreement, they would be able to search the car without probable cause or any other degree of suspicion because in the Third Circuit an unlisted driver has no Fourth Amendment protection in the car. JA 48, 142.

And the incentive to engage in suspicionless searches would not necessarily be limited to rental cars with unlisted drivers. As discussed above (*supra* 36-38), driving without a seat belt, using the wrong kind of gas, or operating a smartphone equally violate rental agreements. Moreover, many, if not most, rental agreements (both automobile and residential) prohibit using the rented premises for criminal activity and deem such activity a material breach. *See* Budget Agreement, *supra*, at 10. That means that a person who has used a rental car to engage in criminal activity will be in material breach of the lease. Thus, if a material breach of a rental agreement eliminates any reasonable expectation of privacy, then the

police would have little reason not to search every rental car they pull over, regardless of who is driving it. If the officers find contraband, no one in the car would have the necessary expectation of privacy to object, as the possession of contraband would constitute a material breach of the agreement.

This Court should not endorse the Third Circuit's rule, which elevates contractual risk-of-loss terms over objectively reasonable privacy expectations and opens the door to suspicionless searches of millions of cars every year.

C. Basing the scope of the Fourth Amendment on rental agreements would fail to provide clear guidance to officers in the field.

In addition to its other failings, the Third Circuit's rule is impractical to apply. This Court's "general preference" is to "provide clear guidance to law enforcement." *Riley v. California*, 134 S. Ct. 2473, 2491-92 (2014); *see New York v. Belton*, 453 U.S. 454, 458 (1981); *Thornton v. United States*, 541 U.S. 615, 623 (2004). As explained, the Third Circuit's approach hinges the scope of the Fourth Amendment's limits on law enforcement on whether a rental-car driver is authorized by the rental agreement. While that approach is relatively easy to state, its application depends on numerous factors that often cannot be readily ascertained at the scene.

First, an officer in the field will often not have access to the full set of terms and conditions governing

the particular rental transaction. While rental companies typically provide customers with a hard copy of a one-to-two page addendum, which serves as the functional equivalent of the car's registration in the event that a customer interacts with law enforcement, that agreement often does not set out all of the terms and conditions that apply to the transaction. For example, some customers are members of a loyalty program, which has its own terms and conditions that govern all covered rentals. *See, e.g.*, *Spotswood v. Hertz Corp.*, No. CV WMN-16-1200, 2016 WL 6879938, at *1 (D. Md. Nov. 22, 2016). In other cases, the addendum may reference a larger, master agreement, whose generic terms "might be supplied at the time of rental," *see Bradley v. Hertz Corp.*, No. 15-cv-00652-NJR-RJD, 2017 WL 4365956, at *2 (S.D. Ill. Sept. 29, 2017), or may otherwise be accessible on the internet. In any particular instance, the officer at the scene therefore may not be aware of all of the terms and conditions relevant to the question of who is authorized to drive the vehicle.

Second, even if the officer has the entire rental agreement at her disposal, she will not necessarily have sufficient legal training to determine all of the agreement's ramifications. For one thing, rental contracts, like virtually all contracts of adhesion, are densely worded documents that even trained lawyers and judges would find tedious to parse. For another, often not all of the rental agreement's legal ramifications will be evident merely from what the document says. Contracts create obligations between parties against the backdrop of state law. And state law can—and sometimes does—impose terms not expressly

stated in the contract. For example, statutes in several states authorize by operation of law licensed drivers to operate cars that their spouses or co-workers rent, irrespective of the rental contract's terms. *See, e.g.*, Cal. Civ. Code § 1939.01 (defining "authorized driver" as including "the renter's spouse" and "co-worker"); Mo. Rev. Stat. § 407.730; Indiana Code § 24-4-9-1. Thus, an officer's determination of whether a driver is authorized to drive the vehicle must take into account background state law—sometimes, as in this case, the law of a neighboring state in which the car was rented—of which she may or may not be fully and currently aware.

Third, even if the rental agreement fully specifies each category of person permitted to drive the vehicle, it will not necessarily be clear to an officer whether the *particular* driver at the scene qualifies under a particular category. For example, the addendum to the rental agreement here permitted the renter's "co-employee[s]" to drive the rental. JA 19. But who qualifies as a "co-employee"? If an employee of Google rents a vehicle, may only other employees of Google have reasonable expectations of privacy in the vehicle, or do employees of Google's parent corporation—Alphabet—also count? What about a co-worker whose terms of employment specify he is an independent contractor? If such a person does not count, is the officer supposed to apply the common law's multifactor right-to-control test to determine whether the driver is an employee or a private contractor before undertaking a search of the vehicle?

In short, using rental-company authorization as a proxy for societal expectations of privacy is not only a

legally misguided endeavor sanctioning widespread suspicionless searches of cars, but it would also be highly impractical for police officers to apply in the field. The far clearer rule—and the one that society generally accepts and that is rooted in settled principles—is that a person has a reasonable expectation of privacy in a vehicle, if she has possession and control over it with the renter's permission. Unlike the Third Circuit's authorized-driver test, the considerations relevant to possession and control will tend to be readily apparent to an officer at the scene, and thus will likely lead to fewer unlawful searches and fewer cases in which evidence of a crime must be suppressed.

III. The Third Circuit Also Erred In Suggesting That Byrd Had No Constitutionally Protected Property Interest In The Car.

We have shown that the Court of Appeals erred in holding that Byrd had no objectively reasonable expectation of privacy in the rental car that he was driving. That showing by itself compels reversal. In addition, the court also erred in concluding that unlisted drivers have "no cognizable property interest in ... rental vehicle[s]." *Kennedy*, 638 F.3d at 165; *see* Pet. App. 8a. Byrd *did* have a property interest in the rental car, and he may raise a Fourth Amendment challenge to the search because, in conducting the search, the officers violated that property interest.

This Court has recently reiterated that the Fourth Amendment establishes a "simple baseline": that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the

Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (quoting *Jones*, 565 U.S. at 406 n.3). In other words, the *Katz* reasonable-expectation-of-privacy framework did not displace the "18th-century guarantee" against "physical intrusion[s]" by the government into places in which a person has a property interest. *Jones*, 565 U.S. at 407, 411. Indeed, cases applying the *Katz* framework recognize that an objectively reasonable expectation of privacy may be grounded in "concepts of real or personal property law," in addition to societal understandings of privacy. *Rakas*, 439 U.S. at 143 & n.12.

At the time of the search, Byrd had property rights in the trunk of the rental car—namely, "the property rights of a bailee." *Jones*, 565 U.S. at 404 n.2. Such property rights have long been protected at common law. *See* 2 William Blackstone, *Commentaries* *452-53 (explaining that a bailee has "a special qualified property transferred from the bailor ... together with the possession" and that "on account of this qualified property of the bailee, he may ... maintain an action .... against any stranger or third person" that may "injure or take away these chattels"). As a bailee, Byrd's property rights included the right to possess the car and to exclude others from it, limited only by Budget's and Reed's superior rights of possession. The troopers in this case violated Byrd's property rights, and therefore conducted a "search" within the meaning of the Fourth Amendment with respect to Byrd, by "physically intruding" into the trunk for the purpose of obtaining information. *Jardines*, 569 U.S. at 5; *Jones*, 565 U.S. at 406 n.3.

When Reed took possession of the car from Budget, she became a bailee. *See* 8 C.J.S. *Bailments* § 1 ("A bailment is created upon delivery of possession of goods and acceptance of their delivery by the bailee."). As a bailee, Reed had a duty of care in safekeeping the bailed property for the bailor. *Rodgers v. Reid Oldsmobile, Inc.*, 156 A.2d 267, 269 (N.J. Super. Ct. App. Div. 1959) (bailment requires "reasonable care"); *Lear Inc. v. Eddy*, 749 A.2d 971, 974 (Pa. Super. Ct. 2000) (bailment requires "ordinary diligence"); *Ferrick Excavating & Grading Co. v. Senger Trucking Co.*, 484 A.2d 744, 749 (Pa. 1984) (bailment requires "great care"). And she became liable to the bailor for damage to the bailed property resulting from any negligence. *Rodgers*, 156 A.2d at 269; *Lear*, 749 A.2d at 974; *Ferrick Excavating*, 484 A.2d at 749.

The bailment also conferred on Reed a possessory property interest in the bailed property—an interest that entails the "right to exclude." *McPherson v. Belnap*, 830 P.2d 302, 303 (Utah Ct. App. 1992); *Lawrence v. State*, 501 S.E.2d 254, 255 (Ga. 1998) ("a bailee has a possessory interest in the bailed property"); *Flagg v. Johansen*, 12 A.2d 374, 376 (N.J. 1940) (a bailee has a "possessory interest" in the bailed property); *United States v. Benitez-Arreguin*, 973 F.2d 823, 831 (10th Cir. 1992) ("A bailment may give 'the bailee the sole custody and control of the article bailed'"); *see generally* 8 C.J.S. *Bailments* § 21 (a bailee has "the right to exclusive use and possession

of the item for the period of the bailment").[11] This makes sense; the law imposes on the bailee a duty to protect the bailed property from damage and thus, as a corollary, confers on the bailee the authority to exclude those who might damage it. *See Godfrey v. Pullman Co.*, 69 S.E. 666, 669 (S.C. 1910) ("the rule is that a bailee has such special property or right in the thing bailed as entitles him to protect it against wrongdoers. As against third persons, he may sue for and recover damages for its injury, loss, or destruction caused by their negligence.").

When Reed transferred the car to Byrd, he too became a bailee.[12] *See U.S. Fire Ins. Co. v. Paramount Fur Serv., Inc.*, 156 N.E.2d 121, 126 (Ohio 1959) (noting that a third-party became a "bailee" even though the initial bailee had no "power or authority to make any subcontract of bailment"); *Siverson v. Martori*, 581 P.2d 285, 288 (Ariz. Ct. App. 1978) (referring to a third-party who borrowed a motorcycle from an initial bailee as a "sub-bailee"); *Revillon Freres v. Cassell Trucking Co.*, 24 A.D.2d 846, 846 (N.Y. App. Div. 1965) (referring to third party that took control of fur

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[11] *Cf. Lockhart v. Western & Atlantic R.R.*, 73 Ga. 472, 473-74 (1885) ("In all cases of bailment, where the property is in possession of the bailee, and a trespass is committed during the continuance of the bailment, this gives the bailee a right of action for interference with his special property, and a concurrent right to the owner or bailor for the interference with his general property.").

[12] The transfer created a subsidiary bailment, sometimes called a "subbailment," in which Reed became a bailor (or "subbailor") to Byrd.

garments as a "subbailee"); *see generally* 8 C.J.S. *Bailments* § 111. And as with the bailment between Budget and Reed, Byrd, as the bailee to Reed, had a duty of care in safekeeping the car and had a possessory property interest necessary to carry out that duty. *Kirchner v. Allied Contractors, Inc.*, 131 A.2d 251, 253 (Md. 1957). The bailment thus afforded Byrd the right to exclude all the world (except Budget and Reed), including, as relevant here, the troopers.

The fact that Budget (the initial bailor) did not give Reed (the initial bailee) permission to lend the car to Byrd does not affect Byrd's status as a bailee. A subbailment is created between the initial bailee and a third party when the third party knowingly accepts the bailed good, even if the bailor did not give the bailee permission to subbail the property. *U.S. Fire Ins. Co.*, 156 N.E.2d at 126 ("Where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another, the one in possession is, by operation of law, generally treated as a bailee of such property and may therefore reasonably be referred to as a constructive bailee."); *Moreno v. Idaho*, No. 4:15-CV-00342-BLW, 2017 WL 1217113, at *5 (D. Idaho Mar. 31, 2017) (where owner did not authorize subbailment, driver was a gratuitous sub-bailee); *see also* Kurt Philip Autor, *Bailment Liability: Toward A Standard of Reasonable Care*, 61 S. Cal. L. Rev. 2117, 2120 n.4 (1988) ("A sub-bailment arises when a bailee delivers possession of the bailed goods to a third party, either with or without the original bailor's authority."); N.E. Palmer & J.R. Murdoch, *Defining the Duty of the Sub-Bailee*, 46 Mod. L. Rev. 73 (1983); N.E. Palmer, *Bailment* 786 (1979) ("sub-bailment" is "that relationship which

arises whenever a bailee of goods, *with or without the authority of his bailor* transfers possession to a third party" (emphasis added)). And that's a good thing *for Budget* because the subbailment obligated Byrd to take care of the car, return it to Reed or Budget, and pay for any damage to the car he caused.[13] And the accompanying right to exclude gave Byrd the legal authority to protect the car against those who might damage it.

Thus, when the troopers physically invaded the locked trunk of the car to conduct a search for evidence of criminal activity, they infringed a property right that Byrd had as a bailee. Since the Founding, that sort of police undertaking—violating a person's property rights for the purpose of obtaining information—has been deemed a search that entitles the holder of the property to full Fourth Amendment protection. Byrd is therefore entitled to challenge the search under the Fourth Amendment. Indeed, that is, again, what this Court effectively said in *Rakas*: "One who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." 439 U.S. at 143 n.12.

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[13] Indeed, some rental contracts expressly provide, for example, that it is a violation of the rental agreement for an unauthorized driver to "fail to promptly report any damage to or loss of the car when it occurs, or when you learn of it and provide [the rental company] with a written accident/incident report." Budget Agreement, *supra*, at 10.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

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No. 16-1371

In the Supreme Court of the United States

TERRENCE BYRD, PETITIONER

v.

UNITED STATES OF AMERICA

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FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to claim that a search of the rental car he was driving violated his individual Fourth Amendment rights, when the renter was forbidden from allowing him to drive it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is reprinted at 679 Fed. Appx. 146. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 9a-18a) is not published in the Federal Supplement but is available at 2015 WL 5038455.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2017. The petition for a writ of certiorari was filed on May 11, 2017, and the petition was granted on September 28, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and possession of body armor by a prohibited person, in violation of 18 U.S.C. 931(a)(1). 1 C.A. App. 13. He was sentenced to 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 14-15. The court of appeals affirmed. Pet. App. 1a-8a.

1. On September 17, 2014, petitioner accompanied Latasha Reed to the Willow Brook Mall in Wayne, New Jersey, so that she could rent a Ford Fusion from Budget Rent A Car System, Inc., a subsidiary of Avis Budget Group, Inc. (Avis). J.A. 18-19, 20, 23, 181; see Pet. App. 10a. The "exact nature" of petitioner's relationship with Reed is "disputed." Pet. App. 10a n.2; see *ibid.* (noting that "Reed is the mother of 'most' of [petitioner's] children" and that he has "referred to her as a 'friend'" but "later claimed that they were engaged") (citations omitted). Petitioner and Reed arranged for Reed to rent the car by herself, without identifying any other potential drivers, and then for petitioner to use the car that she had acquired. J.A. 180-183, 186.

Avis rents its cars only to drivers who satisfy certain criteria. See J.A. 19, 23. At the rental counter, Avis

requires a prospective renter to present a driver's license and certify that the license is "currently valid." *Ibid.*; see J.A. 194. A prospective renter must also certify certain facts about his or her driving history and criminal background—namely, that he or she has "never been convicted of obtaining a vehicle unlawfully, possessing a stolen vehicle, or using a vehicle in a crime or in connection with an unlawful act"; that "within the past 36 months," he or she "ha[s] not had 3 or more accidents" or "been convicted of DWI/DUI/DWAI," "leaving the scene of an accident," "failure to report an accident," or "reckless driving"; and that "within the past 24 months," he or she "ha[s] not had 3 or more convictions for moving violations." J.A. 19, 23. Avis informs the prospective renter that those certifications are "material" to its "decision to rent or permit [him or her] to drive its vehicle." *Ibid.* Petitioner has prior convictions for conduct that includes riding in a stolen van and striking a law-enforcement officer with a vehicle. Presentence Investigation Report (PSR) ¶¶ 39, 41.

Like other rental-car companies, see p. 31 n.*, *infra*, Avis prohibits renters from allowing anyone to drive a rented car who is not specifically authorized to do so under the rental agreement. See J.A. 195-197, 201-202. The rental agreement provides that, other than the renter, the only authorized drivers are (1) the renter's spouse, (2) the renter's co-employee acting on company business, and (3) another person who appears at the time of the rental and signs an authorized driver form. J.A. 19, 24. While still at the rental counter, prospective renters are asked whether "anyone else will be driving the vehicle." J.A. 195. Such "other drivers," who may be added for a fee, "must also be at least 25 years old and validly licensed." J.A. 19, 24; see J.A. 195. The

rental agreement, which lists the renter and additional authorized drivers, J.A. 19, 24, "must stay in the vehicle at all times," J.A. 200. If a renter were to permit an unauthorized person to drive the car, Avis would deem the rental agreement "void," and it "would recover the vehicle." J.A. 201-202.

In this case, petitioner "just sat in [his own] car," J.A. 181, in "front of the building," J.A. 183, while Reed entered the Avis office alone, made the necessary certifications about her own eligibility as a renter, signed the rental agreement, and paid for the rental, Pet. App. 10a; J.A. 19, 23-24. The agreement informed her that if she "provide[d] false or misleading information, [her] use of the vehicle is prohibited and unauthorized." J.A. 19, 23. The agreement also expressly provided, in capital letters, that "PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT." J.A. 19, 24. In addition to signing the agreement itself, Reed separately signed a notice within the agreement that included the statement "[n]o additional drivers allowed without prior written consent." J.A. 18, 22. Reed also initialed a statement that "the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form." J.A. 19, 24. The agreement contained a space for an "Additional Driver" to sign, which was left blank. *Ibid.*

After completing her transaction, Reed rejoined petitioner. J.A. 187. The two then exchanged cars in the shopping-mall parking lot, with petitioner taking sole possession of the rental car, even though the rental

agreement did not permit him to drive it. *Ibid.* Later that day, petitioner began driving the rental car by himself to Pittsburgh, Pennsylvania, which is six or seven hours away from Wayne. J.A. 57, 140, 182.

2. During that trip, petitioner was stopped by the Pennsylvania state police on Interstate 81 outside of Harrisburg. Pet. App. 10a-11a; J.A. 61-67. A police officer had begun to trail him after perceiving him to be driving a rental car in a suspicious manner. J.A. 62-64. The officer pulled the car over, with the intention of issuing a warning, after observing him violating a Pennsylvania statute prohibiting lane misuse. Pet. App. 6a, 15a & n.6; J.A. 37, 66-67.

When the officer approached the car, he noticed that petitioner was extremely nervous. J.A. 37, 68. He asked petitioner for his driver's license and the rental agreement. J.A. 69. Explaining that he had "washed" his driver's license, *ibid.*, petitioner produced an interim New York driver's license that lacked a photograph, J.A. 37, 70. Petitioner also produced the rental agreement and acknowledged that he himself was not the renter. J.A. 69-70. He stated that, instead, "a friend" had rented the car. J.A. 69.

The officer began processing the information petitioner had provided, with a brief interruption while he and petitioner moved the cars to a safer location a short distance down the highway. J.A. 70-71. When the officer checked petitioner's identification, the computer returned a name different from the one on petitioner's interim license. J.A. 71-72. Around the same time, a second officer arrived. J.A. 72-73, 167-168. While the officers were attempting to sort out the identification issue, petitioner explained that he was traveling to Pittsburgh to visit a woman pregnant with his child.

J.A. 170; 3 C.A. App. 17:30-17:36. He reiterated that the car had been rented by a "friend." J.A. 171.

The officers subsequently observed that petitioner was "not on the renter agreement." 3 C.A. App. 21:37-21:38. They eventually determined that the name returned by the computer was an alias; that petitioner had a lengthy criminal history that included drug and weapons charges; and that petitioner had an outstanding non-extradition arrest warrant in New Jersey for a probation violation. J.A. 74-76. The officers asked petitioner to get out of the rental car, J.A. 76, and patted him down, J.A. 145.

After issuing petitioner a warning for the traffic violation, J.A. 81, and apologizing for the delay, J.A. 76, the officers asked him whether he had anything illegal in the car, J.A. 77. Petitioner said that he did not. J.A. 39. The officers asked for his consent to search the car. *Ibid.* At that point, petitioner stated that he had a "blunt" (which the officers understood to be a reference to a marijuana cigarette) in the car, and he offered to retrieve it. J.A. 39, 77-78. The officers declined to let him do so, but continued to seek consent for a search. J.A. 39, 78. They later testified that the circumstances gave them probable cause to justify a search of the car even without consent, but that it was their practice to seek consent in all cases. J.A. 78, 138, 175-176; see, *e.g.*, *California* v. *Carney*, 471 U.S. 386, 390-392 (1985) (warrantless probable-cause-based search of vehicle is lawful); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (warrantless consent-based search is lawful). They told petitioner, however, that they did not actually need his consent to search the car because he was not an authorized driver under the rental agreement. Pet.

App. 12a; J.A. 48, 78. According to the officers, petitioner consented to the search. Pet. App. 12a; J.A. 39, 78, 158. As the search began, petitioner admitted to recently using cocaine. J.A. 40, 78, 173.

The officers opened the trunk and found body armor, J.A. 174-175, which people with certain prior convictions are prohibited from possessing, see 18 U.S.C. 931(a). In light of that discovery, petitioner's continued nervous behavior, and his criminal history, the officers decided to detain, but not arrest, petitioner. J.A. 174-175. After petitioner was informed that he would be placed in handcuffs for purposes of such detention, petitioner attempted to flee on foot. J.A. 79-80, 175. The officers (who had been joined by a third off-duty officer) caught up with him and arrested him. J.A. 80.

After resuming the search, the officers found 49 bricks of heroin in the trunk. J.A. 40, 80; see Pet. App. 4a. The rental car was towed to Harrisburg. J.A. 80.

3. A federal grand jury in the United States District Court for the Middle District of Pennsylvania returned an indictment charging petitioner with one count of possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of possession of body armor by a prohibited person, in violation of 18 U.S.C. 931(a)(1). 2 C.A. App. 27-29.

Petitioner moved to suppress the evidence obtained from the rental car on Fourth Amendment grounds. Pet. App. 9a; 2 C.A. App. 30-33. After conducting an evidentiary hearing, which included testimony from an Avis representative, the district court denied the motion. Pet. App. 18a; see J.A. 191-205. The court determined, as an initial matter, that the evidence was not the fruit of an unlawful seizure, because the stop had been based on the observation of a traffic violation and

had not been unreasonably prolonged. Pet. App. 14a-18a. The court additionally determined that petitioner had "no expectation of privacy in the car" that would permit him to challenge the officers' search of it. *Id.* at 13a. The court observed that petitioner "was not a party to the rental agreement" and "did not pay for the rental." *Ibid.*

Petitioner entered a conditional guilty plea to the charges, reserving his right to appeal the denial of his suppression motion. Pet. App. 2a. The Probation Office's presentence report described Reed as petitioner's "former girlfriend" and recounted petitioner's statement that "he ha[d] been romantically involved" with a different woman, who lives in Pennsylvania, "intermittently for five years." PSR ¶¶ 79-80. The district court imposed a ten-year prison sentence. 1 C.A. App. 14.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court upheld the district court's determination that the stop was lawful, *id.* at 5a-8a, and rejected petitioner's challenge to the search, *id.* at 8a. The court of appeals explained that "the sole occupant of a rental vehicle" has no "Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement," and may not "challenge a search of th[at] vehicle." *Ibid.* The court cited circuit precedent holding that "society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without the permission of the rental company." *Ibid.* (quoting *United States* v. *Kennedy*, 638 F.3d 159, 168 (3d Cir. 2011), cert. denied, 565 U.S. 1110 (2012)).

SUMMARY OF ARGUMENT

The court of appeals correctly recognized that petitioner did not have "a legitimate expectation of privacy," *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978), in a rental car that he had no legitimate basis to drive. Reed could not authorize him to drive Avis's car, and taking it without authorization did not make it his own "effect[]" for purposes of the Fourth Amendment. U.S. Const. Amend. IV.

Petitioner's argument rests on the untenable premise that he is entitled to Fourth Amendment rights for doing something that he was not allowed to do. This Court's precedent makes clear that had he been a passenger in a car that someone else had rented, he would have had no right to challenge the search of its trunk. See *Rakas*, 439 U.S. at 148-149. Taking the wheel without permission and leaving behind the actual renter did not give him additional constitutional protection. Someone who is not "'legitimately on premises,'" such as someone who is driving "a stolen automobile," cannot challenge a search of those premises. *Id.* at 141 n.9 (citation omitted). Petitioner cannot claim to have been "legitimately on premises" here, where Reed's transfer of Avis's car violated an express written directive from the rightful owner.

Even if petitioner could satisfy the threshold requirement of legitimate presence, he cannot carry his further burden to show a legitimate expectation of privacy. He cannot establish any enforceable property rights in Avis's car, given that Reed could not legitimately allow him to take it. Indeed, traditional common-law principles suggest the transfer here was affirmatively unlawful. And although it is possible to have a reasonable expectation of privacy in the absence of

property rights, petitioner cannot establish that society would recognize non-property-based privacy rights in his appropriation of someone else's car. Reed's handover of the car was at the very least a breach of contract, in derogation of Avis's own right to decide whom it will entrust to drive its cars. It is common knowledge that car rental is a personal transaction that does not make the car available for general enjoyment, and strawman car rentals disserve society by frustrating law-enforcement efforts to prevent smuggling and other crimes.

Petitioner errs in contending (Br. 14, 20-26) that he acquired a constitutionally protected interest in Avis's car simply by asserting "possession and control" over it. If that alone were the test, then even Reed's putative permission would be irrelevant; indeed, even a car thief would have Fourth Amendment rights. In any event, petitioner's position insupportably suggests that he could himself bequeath Fourth Amendment rights in the car to subsequent transferees and that those rights would remain with the car no matter how long the rightful owner was divested of its property. His approach would also create an anomalous regime in which someone has more Fourth Amendment rights when the actual renter is not present than when she is, and in which those rights can appear and disappear on a moment's notice. And his further suggestion that he has special Fourth Amendment rights by virtue of his relationship with Reed, the nature of which is disputed, is neither properly presented nor legally sustainable.

ARGUMENT

PETITIONER HAD NO FOURTH AMENDMENT INTEREST IN A RENTAL CAR THAT HE WAS PROHIBITED FROM DRIVING

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. Amend. IV. It does not, however, allow people to challenge searches of "effects" that are not "their[s]," and petitioner's unauthorized possession of Avis's rental car did not in any sense make that car his or give him a reasonable expectation of privacy in it. Petitioner did not own the car, had not rented it, and was not allowed to drive it. He cannot assert Fourth Amendment rights to object to its search.

A. Petitioner's Illegitimate Presence In Avis's Car Cannot Support A Fourth Amendment Claim

Petitioner's only ground for asserting a Fourth Amendment interest in the search of Avis's car is the fact that he was driving it, in violation of the rental agreement. This Court has never recognized a Fourth Amendment claim premised on prohibited activity. It should not do so here.

1. As the constitutional text makes clear, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978) (citation omitted). It has therefore "long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search."

United States v. *Padilla*, 508 U.S. 77, 81 (1993) (per curiam); see, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 171-172 (1969) ("The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.").

Absent the existence of recognized property rights capable of invasion through "physical intrusion," *Florida* v. *Jardines*, 569 U.S. 1, 5 (2013) (citation omitted); *United States* v. *Jones*, 565 U.S. 400, 404 (2012), the touchstone of such a demonstration is an affirmative showing that the defendant had a "legitimate expectation of privacy in the invaded place," *Minnesota* v. *Olson*, 495 U.S. 91, 95 (1990) (quoting *Rakas*, 439 U.S. at 143); see *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980) (recognizing that a defendant "bears the burden of proving * * * that he had a legitimate expectation of privacy"). For a "subjective expectation of privacy" to be "legitimate," it must be "one that society is prepared to recognize as reasonable." *Olson*, 495 U.S. at 95-96 (citations and internal quotation marks omitted); see *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). That is, it must be "one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 144 n.12).

Applying that framework, this Court held in *Rakas* v. *Illinois*, *supra*, "that automobile passengers could not assert the protection of the Fourth Amendment against the seizure of incriminating evidence from a vehicle

where they owned neither the vehicle nor the evidence." *Carter*, 525 U.S. at 87-88 (citing *Rakas*, 439 U.S. at 139-140). Although the passengers were "'legitimately on the premises' in the sense that they were in the car with the permission of its owner," *Rakas*, 439 U.S. at 148 (brackets omitted), they "neither owned nor leased" the car, *id.* at 140, and "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized," *id.* at 148. They had thus "made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car," from which the incriminating evidence had been gathered. *Ibid.* "Like the trunk of an automobile," the Court explained, "these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy." *Id.* at 148-149.

2. The analysis in *Rakas* forecloses petitioner from establishing a legitimate expectation of privacy in the trunk of a rental car he neither owns nor leases simply by taking control of the rental car illegitimately—that is, without the owner's authorization and contrary to the rental contract.

A primary argument of the passengers in *Rakas* rested on the Court's statement in *Jones* v. *United States*, 362 U.S. 257 (1960), that "anyone legitimately on premises where a search occurs may challenge its legality." *Rakas*, 439 U.S. at 141 (quoting *Jones*, 362 U.S. at 267). The Court in *Rakas* rejected the defendants' reliance on *Jones*, in which the Court had allowed Jones to challenge "the search of an apartment * * * owned by a friend" who "had given Jones permission to use [it]" for purposes including storage of possessions and an overnight stay. *Ibid.* The Court in *Rakas* explained that, outside the specific context of *Jones*, "the phrase

'legitimately on premises' * * * creates too broad a gauge for measurement of Fourth Amendment rights." *Id.* at 142; see *Olson*, 495 U.S. at 97 ("[T]he 'legitimately on the premises' standard was rejected in *Rakas* as too broad.") (brackets omitted). Legitimate presence, *Rakas* makes clear, is a necessary, but not a sufficient, foundation for asserting Fourth Amendment rights. See 439 U.S. at 140-149.

The Court in *Rakas* emphasized its prior recognition in *Jones* that "one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them." *Rakas*, 439 U.S. at 141 (citing *Jones*, 362 U.S. at 267). "The Court in *Jones*," *Rakas* explained, "was quite careful to note that 'wrongful' presence at the scene of the search would not enable a defendant to object to the legality of the search." *Id.* at 141 n.9 (quoting *Jones*, 362 U.S. at 267). That is because "by virtue of [his] wrongful presence," the defendant "cannot invoke the privacy of the premises searched." *Ibid.* (quoting *Jones*, 362 U.S. at 267) (emphasis omitted). The Court additionally explained that, in light of its previous "clear statement" of that principle, it would be "inexplicabl[e]" to think that "a person present in a stolen automobile at the time of a search may object to the lawfulness of the search of the automobile." *Ibid.*

3. Petitioner's sole excursion in Avis's car does not satisfy the legitimate-presence prerequisite for a Fourth Amendment claim. Petitioner has never identified any legitimate basis for him to take the car to Pittsburgh. He knew that the car was a rental and that he was not the renter; he waited outside the Avis office while Reed went inside by herself to rent the car. J.A. 69, 171, 181, 183. It is also uncontested that he was "not listed as an authorized driver on the rental agreement,"

Pet. Br. i; in renting the car, Reed did not add him as an additional driver, J.A. 19, 24. When they switched cars in the parking lot and petitioner began to "operate the vehicle," that was a clear "violation" of the express terms "of the rental agreement." *Ibid.* (capitalization omitted); see J.A. 187. Had they not hidden their swap of the vehicles from Avis, their subterfuge would have led Avis to consider the rental agreement "void" and to "recover the vehicle." J.A. 201-202.

Petitioner contends (Br. 34-35) that the "fact that he was not authorized by the contract to *drive* the car is beside the point" because he could have "possess[ed], stor[ed] possessions in, or exclud[ed] others from the vehicle" whether he was the driver or not. That contention cannot be squared with *Rakas*. Under *Rakas*, even an authorized passenger, when he is neither the owner nor the renter of a car, has no Fourth Amendment interest in its trunk (where the contraband in this case was found). See 439 U.S. at 148-149. Petitioner's claim to rights greater than those of an authorized passenger thus necessarily hinges on the assertion of some more significant connection to the car. But any such connection would have to be based on his presence as the driver—the very thing the rental agreement rendered illegitimate and unauthorized.

Petitioner would disregard (Br. 33) the express prohibitions of the rental agreement on the theory that rental-car companies "know and expect" some unauthorized drivers to operate their rental cars. But Avis's recognition that some renters will breach the rental agreement in that manner, and its specification of the insurance-coverage consequences of such a breach, see *ibid.* (citing J.A. 19), does not negate the agreement's explicit designation of "the only ones permitted to drive

the vehicle other than the renter" or its plain and emphatic instruction that "PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT," J.A. 19, 24; see J.A. 18-19, 22, 24 (similar terms). Rather, those consequences enforce Avis's prohibition of unauthorized drivers. And the steps that Avis takes to authenticate the renter and identify additional drivers, J.A. 194-198, and to "recover the vehicle" when unauthorized operation renders the rental agreement "void," J.A. 201-202, refute any notion that it is indifferent to who drives its cars.

4. To the extent that petitioner suggests (Br. 35) that a defendant satisfies the legitimate-presence requirement so long as his actions do not amount to criminal activity, that suggestion is misguided. Petitioner knew that the car belonged to Avis, that Reed alone had rented it, and that he had done nothing to gain Avis's permission to operate it. He thus had no legal basis for driving it. Whether or not his actions carried legal consequences precisely identical to theft, see Part B.1, *infra*, petitioner's operation of the car by himself in contravention of the rental agreement cannot be considered legitimate. Nor could or did the officers make it so by asking him to move the car for safety purposes during the course of the stop, see Pet. Br. 35—apparently before discovering that he was not an authorized driver, see 3 C.A. App. 7:39 (cars moved); *id.* at 21:37-21:38 (remark that petitioner was "not on the renter agreement"). At a minimum, petitioner's unauthorized assertion of control over the car should not give him a greater Fourth Amendment interest in it than a legitimately present passenger would have.

Petitioner objects (Br. 29) to considering the terms of a "private agreement" in this context, but his reluctance is at odds with the text, history, and judicial interpretation of the Fourth Amendment. As a textual matter, many interests in "effects" (or "houses"), U.S. Const. Amend. IV, are created and defined by underlying private agreements, such as a bill of sale, lease agreement, or oral arrangement. As a historical matter, the "significance of property rights in the search-and-seizure analysis," *Jones*, 565 U.S. at 405, likewise counsels respect for the limitations that the rightful owner of property places on the persons who may be present there. And as a jurisprudential matter, this Court's consideration of whether a defendant was "legitimately on the premises," *Olson*, 495 U.S. at 97 (brackets and citation omitted), has relied on private agreements governing the defendant's access to the premises in question. *Jones*, for example, turned on Jones's friend's (presumably oral) "consent to [Jones's] presence" in, and use for certain purposes of, his apartment. 362 U.S. at 267; see *id.* at 265 (emphasizing that defendant "was present in the apartment with the permission of [his friend], whose apartment it was"); see also, *e.g.*, *Olson*, 495 U.S. at 99 (emphasizing that defendant had "the permission of his host[s]" to be a "houseguest"); *Rawlings*, 448 U.S. at 105 (addressing argument that oral agreement created a bailment).

Indeed, petitioner's own argument that he was legitimately present in the car rests on private agreements—namely, the written agreement in which Avis consented to rent the car to Reed and the (oral or implicit) agreement in which Reed gave her own permission for petitioner to drive it. Petitioner acknowledges (Br. 35) that if his actions technically amounted to theft, he would

have no legitimate expectation of privacy in Avis's car. His only basis for distinguishing his actions from theft is that Reed rented the car and then purported to allow him to drive it away. But Reed's own rights in the car are based solely on the rental agreement, which forbade her from doing that. Petitioner would thus rely on the rental agreement to make his actions legitimate while ignoring the express terms of the agreement making those actions illegitimate. He cannot have it both ways.

Petitioner's objection to determining legitimacy by reference to the terms of a written agreement is particularly misplaced because the existence of such an agreement makes the determination relatively easy. Although petitioner suggests (Br. 43) that looking to such agreements is "highly impractical," this Court has previously analyzed oral agreements, and the inquiry will often be even more straightforward when the terms of the agreement are reduced to writing. See *Carter*, 525 U.S. at 86 (unwritten agreement to package cocaine in someone's apartment); *Rawlings*, 448 U.S. at 101 & n.1 (asserted, but disputed, oral agreement to put property in a purse). The relative clarity of a written agreement will aid not only courts reviewing suppression motions, but also (to the extent it might be necessary) facilitate interactions between the police and motorists in the field. The rental agreement here, for example, had to "stay in the vehicle at all times," J.A. 200, and it explicitly stated who was permitted to drive the car, J.A. 19, 24; see also Pet. Br. 41 ("[R]ental companies typically provide customers with a hard copy of a one-to-two page addendum, which serves as the functional equivalent of the car's registration in the event that a customer interacts with law enforcement."). The officers here had no apparent difficulty determining that petitioner was

driving a car without authorization, 3 C.A. App. 21:37-21:38, and could have contacted the rental-car company with any questions, J.A. 200.

5. Petitioner errs in suggesting (Br. 35-38) that disallowing his Fourth Amendment claim here would require disallowing the claims of legitimate renters who may have committed minor breaches of the rental agreement. Petitioner, who had no basis for taking the wheel and treating Avis's car as his own, is differently situated from a legitimate renter to whom Avis has in fact entrusted its car.

The complete absence of a legitimate justification to drive a car is different in kind from restrictions on a legitimate driver's activities. Contractual prohibitions on, for example, hand-held cellphone use, driving without a seat belt, or using the incorrect fuel (Pet. Br. 36, 39) are not inherently directed at the driver's possessory interest. See, *e.g.*, Restatement (Second) of Torts §§ 228, 234 (1965) (distinguishing "[e]xceeding [a]uthorized [u]se" of a chattel from "[m]isdelivery" to someone not entitled to receive it); see also *Fojtik* v. *Hunter*, 828 A.2d 589, 593 (Conn. 2003) (explaining that, for purposes of rental-car company's statutory vicarious liability, state law "recognize[s] a distinction * * * between an authorized driver who breaches the terms of the lease agreement yet still has lawful possession, and an unauthorized driver who is not in lawful possession of the vehicle"). The violation of such a provision does not have direct bearing on *who* may operate the car, and it does not call into question the renter's initial authority to do so—authority petitioner never at any point acquired.

Petitioner's examples (Br. 37) involving breaches of the terms of residential leases are even further afield. This Court has "on numerous occasions pointed out that

cars are not to be treated identically with houses or apartments for Fourth Amendment purposes." *Rakas*, 439 U.S. at 148; see, *e.g.*, *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976) ("This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment."). And even in the context of dwellings, this Court's Fourth Amendment precedents support a distinction between legitimate occupants who violate the terms of occupancy and those who are not legitimately present to begin with. Compare, *e.g.*, *Chapman* v. *United States*, 365 U.S. 610, 616-618 (1961) (concluding that, even with landlord's permission, warrant was required to enter leased home being used for criminal purposes), with *Rakas*, 439 U.S. at 143-144 n.12 (observing that "burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate'").

That distinction is even clearer in the context of a car. A car's "function is transportation and it seldom serves as one's residence or as the repository of personal effects." *New York* v. *Class*, 475 U.S. 106, 112-113 (1986) (citation omitted). Someone present in a car is either a driver, who requires legitimate authorization, or a passenger, who would not have Fourth Amendment rights in the car's trunk, see *Rakas*, 439 U.S. at 148-149. When he drove off alone, petitioner was not a legitimately present person who was merely engaging in an unpermitted activity. He was someone whose very presence in the car, impermissibly asserting sole dominion over its core function, was illegitimate.

B. Neither Property Rights Nor Societal Expectations Support Petitioner's Assertion Of A Fourth Amendment Interest In Avis's Car

Even assuming it were not foreclosed by the legitimate-presence rule, petitioner's claim to a legitimate expectation of privacy in Avis's car lacks foundation. Petitioner cannot show that any expectation of privacy had "a source outside of the Fourth Amendment," either in "concepts of * * * personal property law" or in "understandings that are recognized and permitted by society." *Carter*, 525 U.S. at 88 (citation omitted); see *Rawlings*, 448 U.S. at 104 (recognizing that defendant must affirmatively prove legitimate expectation of privacy). Petitioner had no relevant property rights in the car and his unauthorized use of it was in no way "permitted."

1. Petitioner had no enforceable property rights in a car he was not allowed to drive

This Court's examination of property rights in the context of the Fourth Amendment has focused on the law of trespass or the defendant's "right to exclude" others from the property that was searched. *Rawlings*, 448 U.S. at 105; see, *e.g.*, *Jones*, 565 U.S. at 406 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas * * * it enumerates."); *Rakas*, 439 U.S. at 144 n.12 ("One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.") (citation omitted). Those sources of law do not support petitioner's assertion of a Fourth Amendment interest in Avis's car.

a. A rental agreement is a bailment in which the rental-car company is the bailor and the renter is the

bailee. 61A C.J.S. *Motor Vehicles* § 1884, at 520 (2012). The bailment is one for mutual benefit, in which the rental-car company gives the renter temporary custody of its property (the rental car) and the renter pays a fee and agrees to return the property at a specified time. 8 C.J.S. *Bailments* § 15, at 391-393 (2005).

The rental agreement in this case is also a particular type of bailment, one that is "personal to the bailee." Armistead M. Dobie, *Handbook on the Law of Bailments and Carriers* § 49, at 114 (1914) (Dobie). In "permit[ting] [Reed] to drive its vehicle," J.A. 19, 23, Avis (the bailor) placed its "confidence" in Reed (the bailee) "personally," Dobie § 49, at 114. Avis decided to let Reed rent a car only after reviewing her driver's license, and seeking information about her driving history and criminal background, to ensure that she was an appropriate driver. J.A. 19, 23; see J.A. 194-197 (describing Avis's typical rental procedures). Someone like petitioner, with a history of criminal offenses involving vehicles, would have to make false statements in order to rent one of Avis's cars. See p. 3, *supra*.

"[A]s a general rule, a bailee has no right to delegate the right to use the property to another person, unless there is some understanding or agreement to that effect." 8A Am. Jur. 2d *Bailments* § 84, at 608 (2009); see 8 C.J.S. *Bailments* § 43, at 439 (§ 44 on Westlaw) ("In the absence of statute or of an agreement, either express or implied, giving him or her such power, the bailee cannot sell, pledge or mortgage, exchange, or give away the bailed property, or otherwise expressly or impliedly transfer it.") (footnotes omitted). That limitation is inherent in bailments that are personal to the bailee. See 8A Am. Jur. 2d *Bailments* § 57, at 580; N. E. Palmer, *Bailment* 753 (1979) (Palmer) ("In many

cases, such as the hire of a car from a rental company by a private consumer, it seems that the hirer's right will be a personal one and incapable of alienation, especially perhaps where questions of insurance are involved."). And as this case exemplifies, rental-car companies typically cement that limitation by making it explicit in the agreement through a provision that expressly prohibits the renter from delegating the right to drive the car to any person without authorization. See J.A. 19, 24; see also p. 31 n.*, *infra*; 8 C.J.S. *Bailments* § 3, at 370 ("[A]s a general rule, the rights, duties, and liabilities of a bailor and bailee must be determined from the terms of the contract between the parties."). The rental agreement in this case admonished the renter in three separate places—one in all capital letters—not to permit any unauthorized drivers to operate the car. J.A. 18-19, 22, 24.

b. As a bailee, a legitimate renter acquires certain property rights in the car, including the right to sue for a trespass to chattels, for the term of the bailment. See, *e.g.*, 8A Am. Jur. 2d *Bailments* § 166, at 685-686; cf. *Jones*, 565 U.S. at 404 n.2 (reasoning that defendant "had at least the property rights of a bailee" in his wife's Jeep for purposes of trespass analysis). An illegitimate driver like petitioner, however, would have no such rights. Indeed, under traditional common-law principles, an unauthorized rental-car driver could *himself* be considered a trespasser. See Dobie § 49, at 114 ("An attempt * * * by the bailee to transfer his interest to a third person * * * would * * * give the bailor the right to * * * bring * * * trespass against such transferee, who took possession of the chattel.").

Petitioner attempts (Br. 43-48 & n.12) to provide a property-law basis for his Fourth Amendment claim by

asserting that Reed's permission to take the car "created a subsidiary bailment, sometimes called a 'subbailment,'" that made him a subbailee with a "possessory property interest" in Avis's car. But Reed's lack of authority to give—and binding obligation *not* to give—that permission divests it of any such legal effect. "The transaction by which one person receives possession of the chattel of another is ineffectual if"—as is the case here—"the person delivering the chattel is without authority from the owner to transfer the property interest in the goods, and has no other power so to transfer them." Restatement (Second) of Torts, § 229 cmt. d.

The cases petitioner cites (Br. 46-47) do not show otherwise. In three of them, the authority of the bailee to transfer the property to a third person was not questioned. See *Siverson* v. *Martori*, 581 P.2d 285, 287 (Ariz. Ct. App. 1978) ("[I]t is undisputed that [the bailors] had no control over [the bailee's] use of [the property]."); *Revillon Freres* v. *Cassell Trucking Co.*, 264 N.Y.S.2d 24, 25 (App. Div. 1965) (per curiam) (explaining that the "only issue" was whether an "agent" of the subbailee was entitled to the benefit of a "limitation of liability" entered into between the bailee and the subbailee); *United States Fire Ins. Co.* v. *Paramount Fur Serv., Inc.*, 156 N.E.2d 121, 126-127 (Ohio 1959) (explaining that the plaintiff, the bailor's insurer, elected not to allege that the bailee lacked the authority to enter into a subbailment); *United States Fire Ins. Co.*, 156 N.E.2d at 130 (Zimmerman, J., dissenting) (same). In the fourth case, the court addressed only the property rights of the bailee (not the putative subbailee), concluding that she maintained "constructive possession" of the property, notwithstanding the creation of any subbailment. *Moreno* v. *Idaho*, No. 15-cv-342, 2017 WL

1217113, at *5 (D. Idaho Mar. 31, 2017). Additional state decisions cited by petitioner's amici (Nat'l Ass'n for Pub. Def. & Nat'l Ass'n of Fed. Defenders Amicus Br. 23) are similarly inapposite. See *State* v. *Webber*, 105 P.3d 279, 2005 WL 283585, at *4 (Kan. Ct. App. Feb. 4, 2005) (Tbl.) (per curiam) (no restriction on transfer of rental car); *State* v. *Sanders*, 614 P.2d 998, 1003 (Kan. Ct. App. 1980) (same); see also *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. Ct. App. 1996) ("accept[ing]" *arguendo* defendant's suggestion to "ignore" rental agreement's restrictions for purposes of legal analysis).

c. Far from creating legal rights in the putative subbailee, the unauthorized transfer of a rental car may amount to a tort—or, potentially, even a crime.

The treatise on which petitioner himself relies for his subbailment argument explains that "a bailee who, wrongfully and without authority, sub-bails the goods to an independent third party * * * commit[s] a conversion." Palmer 146. It defines a subbailment as a transfer of goods by the bailee "with or without the authority of [the] bailor" only for the purpose of "assess[ing] the *responsibilities*"—not the *rights*—of the transferee. *Id.* at 786 & n.3 (emphasis added); see *id.* at 786 n.3 (observing that those responsibilities are "substantially similar whether or not the sub-bailment is authorised"). It instead explains that "the lack of authority to sub-bail * * * may, if known to the * * * [sub]bailee, make his reception of the goods," like the bailee's transfer of them, "a conversion." *Id.* at 786 n.3.

Although the rule is not universal, other authorities agree that "any attempt on the part of the bailee to part with the title or possession of the subject matter of the bailment in violation of the contract of bailment * * * constitutes a conversion." 8 C.J.S. *Bailments* § 43, at

439 (§ 44 on Westlaw); see Restatement (Second) of Torts § 234 ("A bailee * * * who makes an unauthorized delivery of a chattel is subject to liability for conversion to his bailor * * * unless he delivers to one who is entitled to immediate possession of the chattel."); 8A Am. Jur. 2d *Bailments* § 57, at 579 (explaining that a "transfer" of the "use or enjoyment" of the "bailed property" "to another," "which is not authorized by the terms of the bailment," "constitutes a conversion"); see also *Discover Prop. & Cas. Ins. Co.* v. *University of Vt. & State Agric. Coll.*, No. 06-cv-22, 2009 WL 4505497, at *6 (W.D. Va. Dec. 2, 2009) (reasoning that the operation of a rental car by an unauthorized driver was "so removed from the purpose of the loan of the vehicle that it might be classified as a temporary tortious conversion"). But see, *e.g.*, *Dockery* v. *Enterprise Rent-A-Car Co.*, 796 So. 2d 593, 596-599 (Fla. Dist. Ct. App. 2001) (finding unauthorized driver's actions not conversion in context of determining rental-car company's liability to accident victim); *Kender* v. *Auto-Owners Ins. Co.*, 793 N.W.2d 88, 95 (Wis. Ct. App.) (finding unauthorized driver to be covered by omnibus insurance policy in absence of "evidence that he intended to steal or convert the vehicle"), review denied, 791 N.W.2d 381 (Wis. 2010) (Tbl.).

In the event of a conversion, the bailor may be able to sue not only the bailee, but also the person who took possession of the property and "knowingly participated in the bailee's diversion of [it]." 8 C.J.S. *Bailments* § 111, at 546; see Dobie § 49, at 114 (explaining that a bailor may "bring trover" against the unauthorized "transferee"). And in some jurisdictions and circumstances, the unauthorized driver of a rental car could be prosecuted for a crime, such as theft or unauthorized use of a motor vehicle. See *State* v. *Pinkston*, No. 103833,

2016 WL 4399396, at *2 (Ohio Ct. App. Aug. 18, 2016) ("In order to be found guilty of the unauthorized use of a motor vehicle, the state need only prove that the defendant knowingly used a motor vehicle without the consent of Hertz, the owner, or Hertz's representative, the person authorized to give Hertz's consent."); *Wade* v. *State*, 29 S.W.2d 377, 378-379 (Tex. Crim. App. 1930) (upholding conviction of unauthorized driver for theft). But see, *e.g.*, *Commonwealth* v. *Campbell*, 59 N.E.3d 394, 402 (Mass. 2016) (concluding that "[a] renter's decision to allow a person who is not a permitted driver according to the rental agreement to drive a rental vehicle" does not "result in a violation of criminal law"); *State* v. *Bass*, 300 P.3d 1193, 1195 (Okla. Crim. App. 2013) (concluding that unpermitted rental-car driver had not committed felony of unauthorized use of a vehicle).

d. Additional common-law remedies available against the unauthorized driver of a rental car reinforce petitioner's lack of any cognizable property right in Avis's car.

Where, as here, "the bailment is personal to the bailee by virtue of confidence reposed in him personally," any attempt by the bailee "to transfer his interest to a third person" would "give the bailor the right to put an end to the bailment"—and may be deemed to end it automatically. Dobie § 49, at 114; see also *Gwin* v. *Emerald Co.*, 78 So. 758, 760 (Ala. 1918) (explaining that when a bailment "imports a personal trust which cannot be transferred," "any attempt on the part of the bailee * * * to part with the title or possession of the subject-matter of the bailment * * * is regarded as putting an end to the bailment") (citation omitted). Consistent with that principle, Avis considers a rental agreement to be "void" if an unauthorized driver takes the wheel. J.A. 201.

Upon termination of the bailment, the right of immediate possession reverts to the bailor. See Restatement (Second) of Torts § 272 cmt. a; 8A Am. Jur. 2d *Bailments* § 202, at 720; 8 C.J.S. *Bailments* § 121, at 559-560 (§ 120 on Westlaw); Joseph Story, *Commentaries on the Law of Bailments* § 396, at 320-321 (7th ed. 1863). And in seeking return of the property, the bailor could enlist the aid of law enforcement to seize it. See Restatement (Second) of Torts § 946 cmt. a (1979) (explaining that action for replevin would "authorize[] the sheriff to seize the [property] and deliver" it to the rightful owner, even "before trial"); see also *id.* § 922 cmt. b; 8 C.J.S. *Bailments* § 152, at 613 (§ 148 on Westlaw).

Thus, under the common law, petitioner's possession and use of Avis's car was possible only insofar as he was able (illegitimately) to conceal his actions from Avis. In driving the car, he faced the constant threat of discovery and dispossession of the vehicle by law enforcement. Cf. *California* v. *Carney*, 471 U.S. 386, 392 (1985) (explaining that "reduced expectations of privacy" in cars "derive" in part from "the pervasive regulation of vehicles capable of traveling on the public highways"). Even in the absence of a prior police report by Avis, a lawful traffic stop could lead Avis to ask, as rental-car companies often do, that steps be taken to preclude the unauthorized driver from occupying the car and to return the car to its rightful owner. See, *e.g.*, *United States* v. *Lamar*, 562 Fed. Appx. 802, 803 (11th Cir. 2014) (per curiam) (upon learning that unauthorized driver was operating rental car, "rental agency requested that its property be returned"); *United States* v. *Mincey*, 321 Fed. Appx. 233, 236 (4th Cir. 2008) (similar), cert. denied, 558 U.S. 945 (2009); *United States* v. *Gilliam*, No. 12-cr-93, 2016 WL 704702, at *2 (W.D. Pa. Feb. 23,

2016) (similar); *United States* v. *Lumpkins*, No. 11-cr-54, 2011 WL 3320530, at *3 (W.D. Mo. July 6, 2011) (similar). Property law cannot reasonably provide a basis for recognizing a legitimate expectation of privacy in such circumstances.

2. No societal understanding provided petitioner with a reasonable expectation of privacy in his unauthorized operation of Avis's car

Although a defendant can sometimes establish a legitimate expectation of privacy without showing "a common-law interest in real or personal property," *Rakas*, 439 U.S. at 144 n.12, petitioner has not done so here. The "personal and societal values protected by the Fourth Amendment," *Oliver* v. *United States*, 466 U.S. 170, 182-183 (1984), do not support petitioner's assertion of constitutional rights in Avis's car. Operation of a rental car in the circumstances here does not serve any "functions recognized as valuable by society," *Olson*, 495 U.S. at 98, but is instead detrimental to property rights, commerce, and public safety. Any expectation of privacy petitioner may have had was therefore not "one that society is prepared to recognize as reasonable." *Id.* at 96 (citations and internal quotation marks omitted).

a. As a threshold matter, to the extent that the unauthorized transfer or use of a rental car constitutes a tort or a crime, society has decided not to countenance it. Tort law and criminal law define the rules through which society regulates primary conduct. It makes no sense for the law to impose civil or criminal liability for an act and yet recognize it as one that creates a "legitimate expectation of privacy," *Carter*, 525 U.S. at 88 (citation omitted).

b. At a minimum, petitioner's appropriation of Avis's car was a breach of contract lacking any justification

that could outweigh the important interests that the breached contractual provisions seek to preserve. Like any property owner, rental-car companies have an interest in ensuring that their property is used responsibly. Without the ability to ensure that their cars are being driven by those qualified to do so, rental-car companies face increased risks—not only of accident and injury, but also "of theft, of the car not being returned, of the car being taken to an unauthorized location * * * [,] and of the car being used for unauthorized purposes." *Planet Ins. Co.* v. *Wong*, 877 P.2d 198, 202 (Wash Ct. App.), review denied, 889 P.2d 498 (Wash. 1994) (Tbl.). The rental agreement here accordingly restricted operation of the car to the renter and a limited set of persons—a spouse or a co-employee on company business—who would have a marriage or business-based legal connection to the renter, and for whom the renter could vouch and act as the point person. See J.A. 19, 24.

When petitioner took over Reed's rental car in breach of the rental agreement, without any foundation for believing that the rental-car company had consented to the transfer, he could not claim any expectation of privacy in the car that society would regard as objectively reasonable. Commercial rental cars are typically easy for potential drivers to identify. See, *e.g.*, *United States* v. *Kennedy*, 638 F.3d 159, 161 (3d Cir. 2011) (noting that "rental key" was "inscribed with the Kulp Car Rental insignia"), cert. denied, 565 U.S. 1110 (2012); *Hill* v. *Commonwealth*, No. 2016-CA-276, 2017 WL 3328117, at *1 (Ky. Ct. App. Aug. 4, 2017) (noting that keychain had "tag connected to it showing a Hertz Rental Car logo"); *State* v. *Huddleston*, 877 N.E.2d 354, 356 (Ohio Ct. App. 2007) (noting that "[b]ased on the keychain, the vehicle

was identified as a rental car"). Petitioner certainly knew that he was driving a rental car, given that he acquired it from Reed in the parking lot outside the rental office and acknowledged to the police that a "friend" had rented it. J.A. 69; see J.A. 181, 183. It is, in addition, common knowledge that commercial rental companies like Avis do not offer up their vehicles for general enjoyment, but instead allow the use of their cars based on specific transactions with specific customers. Restrictions on who may drive a rental car are ubiquitous in the industry.* The record in this case establishes that Avis both discusses the issue with prospective renters and requires them to confirm their understanding in writing, J.A. 18-19, 22, 24, 195-196, and petitioner offers

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* See, *e.g.*, Alamo, *Online Check-In Terms and Conditions* (2017), https://www.alamo.com/en_US/car-rental/checkin/terms-and-conditions.html; Avis Preferred, *Rental Terms and Conditions: United States and Canada*, https://www.avis.com/car-rental/html/global/en/terms/AV_Preferred_Rental_Terms_R1_4.20.16.pdf (last updated Apr. 20, 2016); Budget, *Fastbreak: Terms and Conditions: United States & Canada*, https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf (last updated Apr. 28, 2017); Dollar, *General Policies* (rev. Aug. 25, 2015), https://m.dollar.com/GeneralPolicies_Dollar.aspx; Hertz Corp., *Rental Terms: Rental Qualifications and Requirements* (2014), https://www.hertz.com/rentacar/reservation/reviewmodifycancel/templates/rentalTerms.jsp?KEYWORD=OPERATORS&EOAG=LAX; Maven, *Maven Membership Agreement* (2017), https://www.maven.com/us/membership-agreement.html; National Emerald Club, *Emerald Club Program*, https://www.nationalcar.com/content/dam/National/Emerald%20Club%20agreement%20December%202014.pdf (last visited Dec. 12, 2017); Thrifty, *General Policies and Fee Information* (rev. Nov. 7, 2017), https://www.thrifty.com/AboutUs/content/GeneralPolicies.aspx; Zipcar, *Allowed Drivers*, https://support.zipcar.com/hc/en-us/articles/220676487-Allowed-Drivers (last visited Dec. 12, 2017).

no reason to believe that Avis's practice in that regard is atypical.

A non-renter like petitioner is a stranger to the rental agreement who cannot reasonably expect the same privacy protections as someone who is covered by it. Even where a defendant has transacted face-to-face with someone authorized to grant a property right, this Court has viewed a limited "connection" between the parties as a factor that cuts against a reasonable expectation of privacy in the use of that property. *Carter*, 525 U.S. at 91; see *ibid.* (no reasonable expectation of privacy in one-time short-term use of stranger's apartment); *Rawlings*, 448 U.S. at 105 (no reasonable expectation of privacy in recent acquaintance's purse). Here, no connection of any kind existed between petitioner and Avis, the only entity that could authorize him to drive the car. To the extent that the rental agreement contemplated him at all, it was solely to exclude him as a driver. Petitioner's only connection was to Reed, a person who had no authority to let him take Avis's car.

No societal interest countenances petitioner's acceptance of a car offered in direct violation of the rightful owner's instructions. An *authorized* driver's expectation of privacy would, of course, generally be reasonable. See, *e.g.*, *United States* v. *Miller*, 821 F.2d 546, 548-549 (11th Cir. 1987). And it might well remain so even in the absence of specific property rights—say, in the case of a good-faith renter who is slightly late in returning a car and has thus allowed the rental agreement to expire for a brief period of time. But whatever leeway society might give to an authorized driver who exceeds the terms of his authorization, it would not extend to someone like petitioner, whose actions were never legitimate. See *Kennedy*, 638 F.3d at 167 ("[W]e believe

that society views authorized drivers who return rental cars a few hours late quite differently from unauthorized drivers who borrow rental cars without the rental company's knowledge or permission."); *United States* v. *Cooper*, 133 F.3d 1394, 1400 (11th Cir. 1998) (explaining that the driver of an overdue rental car has an "expectation of privacy" in the car that is "materially different" from that of an unauthorized driver).

c. The unauthorized driving of rental cars also frustrates enforcement of the criminal laws. A criminal like a drug trafficker may well prefer to use a rental car, rather than his own car, to avoid the risk of forfeiture if his illicit actions are discovered. See, *e.g.*, 21 U.S.C. 881(a)(4) (authorizing the forfeiture of vehicles used to transport controlled substances); *United States* v. *Finke*, 85 F.3d 1275, 1277 (7th Cir. 1996) (citing law-enforcement agent's testimony that "drug couriers often use[] rental cars to avoid asset forfeiture laws"). And driving a car rented by someone else, thereby obfuscating the identity of the driver, is a common way to provide further protection to a criminal enterprise. See, *e.g.*, *United States* v. *Allen*, 619 F.3d 518, 523 (6th Cir.) (citing law-enforcement agent's testimony that "drug traffickers often use rental cars to prevent detection"), cert. denied, 562 U.S. 1110 (2010); *United States* v. *Thomas*, 447 F.3d 1191, 1194-1195 (9th Cir. 2006) (drug conspirators rented cars, often in names of others, to transport drugs); *United States* v. *Best*, 135 F.3d 1223, 1225 (8th Cir. 1998) (drug transporter had asked friend to rent vehicle "for him"); *United States* v. *Boruff*, 909 F.2d 111, 113-114 (5th Cir. 1990) (drug dealer had girlfriend rent car for him in his drug smuggling operation), cert. denied, 499 U.S. 975 (1991); *United States* v. *Obregon*, 748 F.2d 1371, 1374 (10th Cir. 1984) (drug transporter

waited outside airport while a third party rented the car).

Petitioner suggests (Br. 38-40) that denying constitutional protection to his conduct would invite a dragnet sweep of rental cars on the roadways. But "the reality hardly suggests abuse," *United States* v. *Knotts*, 460 U.S. 276, 283 (1983) (citation and internal quotation marks omitted). Petitioner points to no actual evidence of the practices he fears in the jurisdictions where it has been the law for decades that an unauthorized driver lacks a legitimate expectation of privacy in a rental car. See, *e.g.*, *United States* v. *Wellons*, 32 F.3d 117, 119 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); *Boruff*, 909 F.2d at 117; *Obregon*, 748 F.2d at 1374-1375. That is presumably because powerful legal and practical obstacles discourage such a practice. Cf. *Utah* v. *Strieff*, 136 S. Ct. 2056, 2064 (2016) (dismissing similar concerns that "police will engage in dragnet searches if the exclusionary rule is not applied").

First, the police cannot stop a car simply because it is a rental; they must have "reasonable suspicion to believe that criminal activity may be afoot." *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (citations and internal quotation marks omitted). Anyone in the car—including a passenger or unauthorized driver—may (as petitioner did below) challenge a stop as a seizure of his or her person for which such suspicion was lacking, regardless of whether he or she has rights with respect to a subsequent search of the car. See *Brendlin* v. *California*, 551 U.S. 249, 253, 255-257 (2007). Second, an unauthorized driver like petitioner could also potentially challenge the search directly, to the extent that it infringed on a reasonable expectation of privacy with respect to particular effects within the car. See *Rakas*,

439 U.S. at 148 (observing that the defendants had not "asserted * * * an interest in the property seized"); cf. *Wyoming* v. *Houghton*, 526 U.S. 295, 297-307 (1999) (considering, but rejecting, car passenger's challenge to search of purse). Third, petitioner's proposal would be an ineffective law-enforcement tactic. Because not every breach of the rental agreement is equivalent to relinquishing the car to an unpermitted driver, see p. 19, *supra*, a search would go unchallenged only if the car's occupant turns out to be an unauthorized driver like petitioner. But officers are unlikely to know before stopping the car whether a particular driver is authorized.

C. Petitioner's "Possession And Control" Test Is Unsound

Petitioner contends (Br. 20) that his Fourth Amendment rights in Avis's car should depend not on whether he was an authorized driver under the rental agreement, but instead on whether he had "possession of and control over a closed space." See, *e.g.*, Pet. Br. 21 ("Possession and control over a closed space establishes a reasonable expectation of privacy."). The approach is unsupported by precedent and inherently flawed.

1. Nothing in this Court's precedents supports petitioner's proposed "possession and control" test. His assertion that "[a]ll that mattered" in *Jones* "was that the visitor had some measure of 'dominion and control,'" Br. 22 (quoting *Rakas*, 439 U.S. at 149), disregards that the visitor also "had permission to use the apartment," *Rakas*, 439 U.S. at 149, from someone with actual (or at least unquestioned) authority to grant it. The same was true of the overnight guest whose Fourth Amendment rights were recognized in *Minnesota* v. *Olson*, *supra*. See 495 U.S. at 99 ("The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest."). And it was also true

of the defendants in the other cases on which petitioner's proposal relies. See *Mancusi* v. *DeForte*, 392 U.S. 364, 365 (1968) (defendant legitimately present in his office); *Rios* v. *United States*, 364 U.S. 253, 256 (1960) (defendant legitimately present in a taxicab); see also *Rakas*, 439 U.S. at 149 n.16 (observing that the "right to contest the search was not presented * * * or addressed" in *Rios* and limiting *Rios* to its facts).

2. Even petitioner recognizes that the Fourth Amendment rights of a rental-car driver cannot turn on "possession and control" alone. He acknowledges (Br. 21 n.7), for example, that under this Court's decision in *Rakas*, a person who has "stolen" a rental car cannot object to its search, notwithstanding that he both possesses and controls it. See 439 U.S. at 141 n.9. He also appears to acknowledge (Br. 24) that a person who has possession and control of a rental car would nevertheless lack a reasonable expectation of privacy in the car if the person lacked "the renter's permission to drive" it. See, *e.g.*, Pet. Br. 26 (asserting that petitioner's "possession and control of the car *with the renter's permission* is sufficient to establish his reasonable expectation of privacy in the car") (emphasis added).

Petitioner does not attempt to articulate any principle underlying those apparent exceptions to his proposed rule. But by accepting them, petitioner implicitly acknowledges that the possession and control must be "legitimate." *Rakas*, 439 U.S. at 143. This Court explained in *Rakas*, for example, that "one who owns or *lawfully* possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of th[e] right to exclude." *Id.* at 144 n.12 (emphasis added). And *Rakas* viewed the absence of a "possessory interest in the automobile" *id.* at 148—*i.e.*, the absence

of a "*right* to control" and "exclude others," *Black's Law Dictionary* 1353 (10th ed. 2014) (emphasis added)—as significant. Petitioner's position thus rests not on whether he had "possession and control" of Avis's car, but on whether his assumption of possession and control—in contravention of the express terms of the rental agreement—was an act that "the law recognizes as 'legitimate.'" *Rakas*, 439 U.S. at 144 n.12. For the reasons explained above, it was not.

3. Petitioner's position that Reed's unauthorized say-so was sufficient to give him a legitimate interest in Avis's car has no logical stopping point and would produce anomalous results. First, his view implies that someone who received the car from *him* would also have a legitimate expectation of privacy while driving it. Although petitioner undoubtedly lacks authority to transfer the car to someone else, that does not distinguish him from Reed, whose own transfer was likewise unauthorized. Petitioner would presumably acknowledge that a legitimate expectation of privacy ceases to exist at some point in a chain of unauthorized automobile transfers. The only sensible point is the initial impermissible handover—in this case, Reed's.

Second, petitioner's view suggests no temporal restrictions. One would think that after some number of days and weeks beyond the term of Reed's rental, the rental car would be considered "stolen," Pet. Br. 21 n.7, if it had still not been returned. But given that petitioner does not believe that the conditions of Reed's rental have any bearing on his Fourth Amendment rights, petitioner has no basis for identifying when that temporal endpoint would be.

Third, petitioner's approach would have reasonable expectations of privacy blink in and out of existence,

moment by moment, in insupportable ways. Petitioner suggests (Br. 34-35) that sole occupancy of a vehicle in itself is constitutionally significant, asserting that a passenger acquires a Fourth Amendment interest in a car if the driver leaves him in it while visiting a store. But the understanding that the trunk, glove compartment, and other areas of the car do not belong to the passenger, see *Rakas*, 439 U.S. at 148-149, does not change simply because the driver ducks out to buy a soda, even if the driver trusts the passenger with the keys for purposes of "listening to the radio" (Pet. Br. 34) during the driver's brief absence. On petitioner's rationale, the Court's holding in *Minnesota* v. *Carter*, *supra*—that the defendants could not "claim the protection of the Fourth Amendment in the home of another" based on a short-term commercial venture there, 525 U.S. at 91—would have come out the other way had the police happened to arrive while the defendants were inside, but the leaseholder was out running a brief errand.

4. To the extent that petitioner suggests (Br. 26-28) that a "close familial connection to the renter" entitles him to special Fourth Amendment rights that others in his circumstances would not have, that argument is neither properly presented nor doctrinally sound.

Petitioner's briefs in the court of appeals did not press the point he now raises, and the court did not address it. Petitioner's opening brief referred to Reed as his "girlfriend" (not his fiancée). Pet. C.A. Br. 4. It noted that they had children together, *ibid.*, but it did not otherwise discuss the nature of their relationship or urge it as a separate ground for finding that he had Fourth Amendment rights in the car she had rented, see *id.* at 23-25. He did not, for example, suggest that the relationship fit within the "extraordinary circumstances"

exception, *Kennedy*, 638 F.3d at 168, that the court below had recognized to the general rule precluding Fourth Amendment claims by unauthorized rental-car drivers. See *ibid.* (citing *United States* v. *Smith*, 263 F.3d 571 (6th Cir. 2001)); Pet. Br. 27-28 (noting that marriage was a factor in *Smith*).

It is well-established that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Consideration of petitioner's new argument would be particularly unwarranted here, where the petition for a writ of certiorari likewise referred to Reed as petitioner's "girlfriend," Pet. 2, 5; see Pet. 15, and did not identify the quasi-marriage relationship he now asserts as a point of distinction from decisions he alleged to conflict with the decision below.

The factual dispute is particularly pertinent because the record does not clearly support the proposition that petitioner, "by his conduct, has exhibited an actual (subjective) expectation of privacy," *Knotts*, 460 U.S. at 281 (citation and internal quotation marks omitted), based on his relationship with Reed. He told the officers during the stop that the car had been rented by a "friend." J.A. 69, 146, 155, 171, 177. Although he testified at the suppression hearing that he and Reed had been engaged when she rented the car, J.A. 180, he later told the Probation Office that he had been "romantically involved" with another woman, in another State, "intermittently for five years," PSR ¶ 79. The Probation Office report described Reed as petitioner's "former girlfriend" and did not view her as "an appropriate verification source" for "his personal history information."

PSR ¶ 80. And petitioner did not testify that he believed he was (or claim that he actually was) authorized to drive Avis's car on the ground that he was Reed's "spouse." J.A. 19, 24; see J.A. 179-188.

In any event, petitioner's asserted close relationship with Reed provides no basis for extending Fourth Amendment rights to encompass his claim in the car she rented. To the extent that society expects families to share rental cars, Pet. Br. 26-28, that expectation is reflected in rental agreements' express exemption of spouses from the general prohibition on unauthorized drivers, *e.g.*, J.A. 19, 24, and by state laws that deem spouses to be authorized drivers for at least certain purposes, see, *e.g.*, Cal. Civ. Code § 1939.01(e)(2) (West Supp. 2017); Mo. Ann. Stat. § 407.730(2)(b) (West 2011); Nev. Rev. Stat. Ann. § 482.31515(2) (LexisNexis 2010); Or. Rev. Stat. § 646A.140(1)(b) (2015). Here, petitioner has made no showing of any special relationship or exceptional circumstances that should allow him to clothe himself in whatever rights Reed acquired as a renter. His assertion of her rights in this circumstance is thus akin to the sort of "vicarious Fourth Amendment claims" that this Court has long rejected, partly in recognition that they "exact[] a substantial social cost" because "[r]elevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Rakas*, 439 U.S. at 137.

Petitioner, on this record, gives all appearances of having used Reed as a straw renter to allow him to take sole control of a rental car that he would not have been able to rent himself. He did so either knowingly or in unreasonable unawareness of his lack of legitimate rights in the car. Petitioner retained reasonable expectations of privacy and security in his "person[]," but he

had no reasonable expectation of privacy or security in the trunk of the rental car—an "effect[]" he had no legitimate authority to possess or control.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

This case comes down to whether violating a contract term negates the Fourth Amendment rights a driver ordinarily has against suspicionless searches of a car. Typically, a person with sole possession and practical control over a car would have Fourth Amendment protection regarding searches of the car. The government, however, posits that violating a rental agreement negates any reasonable expectation of privacy and permits a suspicionless search of the car and its locked trunk.

But not all contract violations are equal in the eyes of the government. A renter who fails to return a car on time, uses a cell phone while driving, or violates any of a rental agreement's myriad other use restrictions maintains Fourth Amendment protection regarding searches of the car. But an unlisted driver, operating the car with the renter's permission, has none.

The government tries to justify this odd result—where neighboring contract provisions with the exact same remedies specified in the contract have dramatically different constitutional ramifications—by equating the unlisted driver with a car thief. As state and federal courts have held, however, the contract violation is just that—a contract violation. Neither the renter nor the unlisted driver violates any criminal law when the unlisted driver takes possession of the car. The contract adds additional risk of loss in such circumstances, but that risk of loss does not include the risk of losing the fundamental Fourth

Amendment right against arbitrary searches by the government.

If the government prevails, it will have the power to conduct suspicionless searches, whenever it stops a rental car driven by an unlisted driver for a routine traffic violation. The government embraces this power, contending that the requirement that it justify a search of rental car would impede public safety. And the government does not stop there. It argues that non-owner passengers *never* reasonably expect privacy in the trunks of cars, no matter their connection to the car or the driver. It likewise believes that people subleasing apartments have no Fourth Amendment rights in their residence if the sublease violated the terms of the master lease. As with the unlisted driver, the government says the contract violation negates any reasonable expectation of privacy and permits suspicionless searches. Trust us, the government says, we won't abuse the power to search without justification.

The government raises misguided policy arguments in favor of a power to perform suspicionless searches any time it finds an unlisted driver. It offers no justification, however, for deviating from the general test for determining whether a person reasonably expects privacy, which looks to possession and control. Put in those terms, the answer here is obvious. Mr. Byrd was in sole possession of the car with the permission of his fiancée who rented the car, he had the key to the car and the locked trunk, and he could exclude strangers from the car. He therefore may challenge the search of the locked trunk.

Finally, though a property right is not necessary to invoke the Fourth Amendment, it can be sufficient. The government is wrong that Byrd had no property rights in the car. Because Reed granted him possession of the car, under longstanding bailment principles, Byrd was a bailee and had the right to exclude strangers.

Thus, Byrd may challenge the search based on both a reasonable expectation of privacy and a property right. A government's power to engage in suspicionless and arbitrary searches is anathema to a free country. *See Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."). This Court should reject the government's invitation to grant police that power based on violation of a term of a rental agreement.

I. A Person Who Possesses And Controls A Car, With The Renter's Permission, Has A Reasonable Expectation Of Privacy In The Car's Locked Trunk.

A. The proper standard looks to possession, control, and the renter's permission.

A person has a reasonable expectation of privacy in a place or effect—like the locked trunk of a car—that he possesses and controls, provided that he does not come into possession by violating criminal law. OB 20-24, 35. The government mostly agrees. It acknowledges that "one who ... lawfully possesses or

controls property will in all likelihood have a legitimate expectation of privacy by virtue of th[e] right to exclude." GB 36 (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)). And the government does not dispute that Byrd possessed and controlled the car with the renter's permission when the officers searched the car or that he could have lawfully prevented strangers from rummaging through the car's trunk.

Nonetheless, the government argues that the police may search the locked trunk of a car driven by an unlisted driver, without justifying the search to any court and even if they lack probable cause to believe the trunk contains evidence of a crime. According to the government, Byrd's violation of the rental agreement's authorized-driver provision means that he was not "legitimately present" in the car and therefore had no Fourth Amendment rights in it. GB 13-16. To be "legitimately present," the government contends, Byrd needed to demonstrate a connection to the car greater than possession and control, and that connection must be "legitimate," which in the government's view means consistent with the terms of the rental agreement. GB 15. The government claims this greater connection is necessary to distinguish Byrd from a passenger who, in the government's view, can have no reasonable expectation of privacy in the trunk of a car. *Id.*

The government's position cannot withstand scrutiny for four reasons: (1) it is entirely divorced from the everyday expectations of privacy the Fourth Amendment protects; (2) its overly broad "legitimate presence" requirement finds no support in this

Court's precedent; (3) it depends on the incorrect assertion that passengers can never have a reasonable expectation of privacy in the trunk of a car; and (4) it ignores the significance of familial relationships.

1. Possession and control, not compliance with contractual terms of use, reflect society's understanding of a reasonable expectation of privacy. A person who controls a space, and can exclude most others, reasonably believes that his effects will not be scrutinized by strangers or subject to suspicionless searches by the government. *See United States v. Chadwick*, 433 U.S. 1, 11 (1977). Indeed, the government does not dispute that possession and control have been the determinative factors in this Court's Fourth Amendment jurisprudence. GB 36; OB 21.

Looking to whether a person has possession and control answers the question the reasonable-expectation-of-privacy inquiry asks: was the search an intrusion with respect to the person seeking to challenge it? A search of a car's trunk is plainly not an intrusion into the privacy of a person who has never used or accessed the trunk. *See Rakas*, 439 U.S. at 130, 148. In contrast, here, a person with sole possession and control over a car, with the renter's permission, who elects to store personal possessions in the car's locked trunk, has both practical dominion and possession of the car and its trunk, fully supporting a reasonable expectation of privacy. *See id.* at 142 (distinguishing a defendant who had never been in the basement from a houseguest who had a measure of possession and

control over it).[1] The privacy intrusion caused by opening a locked trunk and riffling through its contents, where the unlisted driver has the key and sole possession of the car, is certainly greater than the intrusion from patting the outside of a bag placed on a bus's luggage storage rack. *See Bond v. United States*, 529 U.S. 334, 338-39 (2000) ("[A] bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.").

An unlisted rental-car driver stands in the same legal position as an apartment subletter where the rental agreement between the landlord and the initial tenant prohibits subleasing. OB 37. In that scenario, the subletter possesses the key, has sole practical control over the apartment, and has the initial tenant's permission to live there. Yet the government asserts that the subletter has no reasonable expectation of privacy in her home because she would not be "legitimately present to begin with." GB 20. Same with a family of five that rents a vacation apartment contractually capped at four people. According to the government, the police may freely come and go in these apartments, without any justification whatsoever.

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[1] The government incorrectly suggests that when the troopers asked Byrd to again take sole possession of the car and move it to another location, they did not know he was an unlisted driver. GB 16. But Trooper Long testified that he learned that Byrd was not listed on the rental agreement at the very outset of their interaction, before he asked Byrd to take control of the car and move it. JA 69, 71.

In those contexts, as here, allowing suspicionless searches degrades the commonsense notion of privacy embedded in the Fourth Amendment.

2. The government relies on a footnote in *Rakas* to argue that a driver who violates an authorized-driver provision "cannot invoke the privacy of the premises searched" because his presence is "wrongful." GB 14 (citing *Rakas*, 439 U.S. at 141 n.9). But *Rakas* nowhere suggests that a person's right to challenge a search requires compliance with the contractual restrictions a rental company places on use of its property. *Rakas* refers only to *criminal* conduct—a "burglar" who has no connection to the premises other than his criminal act, *id.* at 143 n.12, and "a person present in a stolen automobile," *id.* at 141 n.9.

The government notes that in *Rakas* this Court observed that the passengers were "legitimately on the premises in the sense that they were in the car with the permission of the owner." *Id.* at 148 (internal quotation marks and alterations omitted). But the Court made that observation in the course of *rejecting* the "legitimately on the premises" test. *Id.* *Rakas* simply described a context where the owner was the driver. Nowhere did this Court suggest that the owner's, as opposed to the renter's, permission was *necessary* to have a reasonable expectation of privacy. Indeed, in *Jones v. United States*, 362 U.S. 257, 267 (1960), which *Rakas* reaffirmed, the defendant reasonably expected privacy despite having only the *renter's* permission to spend the night. OB 22. There is no reason to believe the result in *Jones* would have been different if the landlord barred overnight guests; the friend's privacy expectation came from the social

understanding that a houseguest expects privacy when spending the night in another's home, not from the landlord's permission.

The *Rakas* footnote has no application here. Unlisted drivers are not car thieves. The government does not dispute that Byrd entered the car legally or that Budget and Reed permitted him to "possess, store possessions in, or exclude others from" the car. *See* GB 15 (alterations omitted). Indeed, a driver given permission by the renter to drive the car does not even deprive "the rental company of any short-term use to which it otherwise would have been entitled." *Commonwealth v. Campbell*, 59 N.E.3d 394, 402 (Mass. 2016). Violating the authorized-driver provision may result in additional civil liability if the car is damaged, but "it does not also result in a violation of criminal law." *Id.*; *see also United States v. Smith*, 263 F.3d 571, 587 (6th Cir. 2001) ("It was not illegal for Smith to possess or drive the vehicle, it was simply a breach of the contract with the rental company.").[2] Indeed, courts consider unlisted driving so common and foreseeable that many refuse to enforce authorized-driver provisions. OB 33; NAPD Br. 26-29.

The line *Rakas* drew at criminal possession comports with societal understandings of privacy—that a

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[2] The government asserts that in some other "jurisdictions ..., the unauthorized driver of a rental car could be prosecuted for a crime, such as theft or unauthorized use of a vehicle." GB 26-27. But the cases it cites bear little resemblance to this one. *Wade v. State*, 29 S.W.2d 377, 378-79 (Tex. Crim. App. 1930), did not involve an unauthorized driver. And in *State v. Pinkston*, No. 103833, 2016 WL 4399396, at *2 (Ohio Ct. App. Aug. 18, 2016), the renter reported the vehicle stolen.

person cannot claim a right to privacy where his only connection to the place is his criminal act. 439 U.S. at 141 n.9. The criminal has invaded the occupant's privacy against the occupant's wishes. The same cannot be said in regard to someone invited by the renter. *See Jones*, 362 U.S. at 266-67 (a person invited by the renter may assert Fourth Amendment rights).

The government concedes that a person's presence in a rental car does not become "wrongful" when he violates the rental company's terms of use. GB 19. The government recognizes, for instance, that an authorized driver's presence remains legitimate when he violates terms that prohibit driving the car while talking on a cell phone or using the car for towing. GB 19; OB 36-37. The government has no sound basis to treat the authorized-driver provision differently. It cannot be because disregarding an authorized-driver provision might harm the rental company, GB 30—many breaches of contract might do that. OB 36. Nor can it be because the authorized-driver provision limits who may legitimately possess the car, GB 19 (distinguishing between restrictions that "are not inherently directed at" possession and those that are)—the government does not dispute that unlisted drivers may, consistent with the contract terms, possess rental cars and store possessions in the locked trunk. GB 15.

Moreover, rental agreements generally do not distinguish between restrictions on who may drive the car and restrictions on how the car may be driven. Indeed, rental companies' standard terms and conditions prohibit unlisted drivers in the *same paragraph* that they prohibit driving while talking on a cell

phone and using the car for towing. OB 36. And the terms and conditions specify the *same consequence* for breach of these terms—the risk of loss shifts to the driver, and the rental company may terminate the rental. *Id.*[3]

3. The government contends that no one can reasonably expect privacy in the trunk of a car unless they own the car or are *driving* the car with the owner's consent. GB 11-14. That argument is premised on the government's flawed "legitimate presence" theory (*see supra* 6-10), and a faulty supposition that passengers may never reasonably expect privacy in a car's trunk. As to the latter, the government cites *Rakas*. But *Rakas* expressly disclaimed any intention to hold "that a passenger lawfully in an automobile may not invoke the exclusionary rule and challenge a search of [a] vehicle unless he happens to own or have a possessory interest in it." *Rakas*, 439 U.S. at 149 n.17 (internal quotation marks omitted).

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[3] The government cites the testimony of an Avis-Budget representative, who had no involvement in the rental here. He testified that, in his view, breach can "void" the rental agreement and can permit the rental company to "repossess" the car. The contract in the record here, however, does *not* say that violation of the authorized-driver provision voids the agreement. JA 19. The word "void," as used in the contract addendum, refers only to the insurance coverage provided. JA 24. And even in cases where rental agreements say that a violation would void the contract, such language would apply equally to the myriad other use restrictions, and would not implicate the driver's reasonable expectations of privacy. *See United States v. Walton*, 763 F.3d 655, 664-65 (7th Cir. 2014) (reliance on the rental contract's voiding language for restricted uses "proves too much").

The passengers in *Rakas* were found to lack a reasonable expectation of privacy not because they were "passengers *qua* passengers," but because they failed to establish that they had possession and control over the search area. The defendants, who had been in the car only briefly, "did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched." *Id.* at 149 n.17. Had a passenger in that case made such a showing—by, for example, demonstrating that the passenger had permission to use the glovebox and held the key to it—*Rakas* would have been a very different case.

Rakas simply stands for the commonsense proposition that passengers in a car, much like guests in a house, may have Fourth Amendment protection in the car so long as they establish that they reasonably expected privacy in the part of the car that was searched. Under that standard, Byrd plainly had a reasonable expectation of privacy in the locked trunk—he had sole possession, the key, and the practical ability to exclude others.

Even the government concedes that Budget's rental agreement permitted Byrd, with the renter's consent, to "possess, store possessions in, or exclude others from the vehicle." GB 15 (quoting OB 34-35 (alterations omitted)). That authority, by itself, is sufficient to consider Byrd "legitimately present" for Fourth Amendment purposes.

4. Byrd's reasonable expectation of privacy is further buttressed by his familial connection to the renter—his fiancée. OB 26-28. Byrd's close relationship to Reed enabled Reed to "share ... h[er] privacy

with hi[m]." *Minnesota v. Olson*, 495 U.S. 91, 99 (1990).

The government's response brushes off the "importance of the family" and the privacy expectations families share, asserting that personal connections to the renter are irrelevant unless they are memorialized in rental agreements or state law, GB 40. But the privacy of the family is the default—it needs no affirmative legislation or contract to be entitled to respect. And that is true whether Reed was Byrd's fiancée (as he testified) or "merely" his long-term girlfriend and the mother of his children (as the government contends).[4] *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony.").[5]

B. Policy considerations do not support deviation from a standard based on possession and control.

The opening brief explained that society recognizes as reasonable an unlisted driver's use of a rental

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[4] The government misleadingly cites the Presentence Report to suggest that Reed was Byrd's "former girlfriend." GB 39. That report was completed over a year after the traffic stop during which time Reed and Byrd split up.

[5] The significance of Byrd's relationship to the driver is properly presented. Byrd raised his relationship with Reed four times in the petition for writ of certiorari, Pet. 2, 5, 14-15. Moreover, this argument was foreclosed before the Third Circuit because that court held that a man who drove his "girlfriend's" rental car had no reasonable expectation of privacy in the car. *See United States v. Kennedy*, 638 F.3d 159, 161 (3d Cir. 2011).

car because the circumstances in which drivers take the wheel of rental cars are commonplace and reasonably foreseeable by rental companies. OB 32; NAPD Br. 11-13. The government disputes none of this. Rather, it argues on policy grounds that this Court should carve out a judicial exception to everyday notions of privacy for unlisted drivers. None of its policy arguments support deviating from a standard based on possession and control.

1. The possession-and-control test is necessary to avoid incentivizing suspicionless searches and to provide clear guidance.

a. The government contends that prohibiting suspicionless searches of rental vehicles driven by unlisted drivers, operating the car with the renter's permission, would "frustrate[]" law enforcement. GB 33-34. But what is most expedient for law enforcement is not the test. *Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006) ("A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.").

Moreover, it does not materially impair lawful police work to acknowledge that an unlisted driver, who possesses the car with the renter's permission, reasonably expects privacy in the locked trunk of the rental car. If the police have reasonable suspicion that a person driving a rental vehicle is engaged in criminal activity, they may stop the car. And if, after the stop, they have probable cause to believe the trunk contains evidence of a crime, they may search the trunk.

Exempting rental cars driven by unlisted drivers from the ordinary constitutional rules "creates a serious and recurring threat to the privacy of countless individuals"—"giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). It is hardly theoretical that the police will exercise that power, or that their decision to do so may be arbitrary. The troopers here admitted that they tailed Byrd until they could pull him over for a minor traffic violation largely because he was driving a rental car. OB 39.

The troopers also explained that they knew they could search the car without cause if it turned out that Byrd was not listed on the rental agreement. OB 39. And, of course, as soon as they stopped the car, they immediately checked to see if Byrd was on the rental agreement. JA 69. The government's proposed rule would condone and incentivize this gambit and would thus authorize arbitrary and standardless searches resembling general warrants. OB 4; Restore the Fourth Br. 8.[6]

The government and its amici blink reality by insisting otherwise. GB 34-35; States Br. 4-15. They contend that the reasonable-suspicion requirement

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[6] In another notable example, Maryland state police stopped Judge Robert Wilkins (then a public defender) and his family while they were returning from a funeral because they were driving a rental car. Robert L. Wilkins et al., *Addressing Declining Rights in an Era of Declining Crime*, 9 J.L. & Pol'y 215, 232-35 (2001). After Judge Wilkins refused to consent, the officers searched the car anyway.

for an investigatory stop is a substantial bulwark against arbitrary searches. GB 34; States Br. 4-8.[7] But they do not dispute that it is nearly impossible to drive a car for any length of time without committing a minor traffic violation. This case—where the troopers identified a rental car, followed it, and then pulled it over when it stayed in the left lane for 0.2 miles too long —vividly illustrates that reality.[8]

b. The opening brief explained that a rule tying reasonable expectations of privacy to the terms of the rental agreement will be difficult to administer. OB 40-43. The government's response simply misstates the problem officers face. GB 18-19. The government is wrong that officers need only check whether the driver's name is on the rental agreement. An author-

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[7] In seeking to minimize the number of times the police have unjustifiably searched cars driven by unlisted drivers, the state amici ignore that most car searches do not discover evidence of a crime and do not end up on Westlaw. *See* Jeff Guo, *Police are searching black drivers more often, but finding more illegal stuff with white drivers*, Washington Post (Oct. 27, 2015), https://tinyurl.com/ybbsrqs4.

[8] Nor is it any assurance that reasonable suspicion is required to further extend a stop's duration. The permissible duration of a traffic stop without reasonable suspicion of a crime includes numerous inquiries, such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration." *See Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). During that time one officer can engage in a suspicionless search of the car while the other undertakes the allowed inquires. Further, some courts treat being an unlisted driver as a potential factor that may support extending a traffic stop. *Smith*, 263 F.3d at 592.

ized driver's name might *not* appear on the agreement. In particular, the officer needs to know what categories of people (e.g., spouses or employees) are authorized by operation of law to drive a rental car irrespective of what the rental terms. OB 41-42. And the officer needs to assess whether the driver qualifies under one of the categories of authorized drivers specified in the agreement. OB 42. And some rental companies do not even issue paper contracts. *See* Nat'l Motorists Ass'n Br. 7. Thus, a rule that turns on contract restrictions is both wrong and not easily administrable.

2. Rental companies' commercial interests are protected by contract law.

In arguing against affording Fourth Amendment rights to the unlisted driver, the government cites "the important interests that the breached contractual provisions seek to preserve." GB 29-30. But the reasonable-expectation-of-privacy inquiry does not call for balancing the significance of privacy interests against commercial interests. Contract law fully defines and protects the commercial interests the rental agreement serves. The rental companies know that unlisted drivers often drive rental cars, and they draft contracts to anticipate that issue and provide the chosen remedy: shifting additional risk of loss onto the renter. JA 24.[9]

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[9] The government suggests that recognizing that unlisted drivers reasonably expect privacy in rental cars would allow

3. Potential tort or contract liability does not render a driver's expectation of privacy unreasonable.

The government maintains that an unlisted driver cannot have a reasonable expectation of privacy in a rental car because he might be liable for a tort or guilty of a crime. GB 29. But, as explained *supra* 7-8, an unlisted driver, who operates a rental car with the renter's permission, does not commit a crime. And even if Byrd has potential tort or contract liability, that does not make his expectation of privacy unreasonable. The renter would also incur contract or tort liability by driving the rental car in violation of many other terms, such as the prohibition on cell-phone use, OB 36, or by returning the car a day late. But the government concedes that a renter who violates these terms would still have a reasonable expectation of privacy in the car. GB 10, 19-20.

Finally, the government misleadingly suggests that, if possession and control with the renter's permission suffices to establish a reasonable expectation of privacy in a rental car, then an unlisted driver could reasonably expect privacy in a rental car for an indefinitely long period after the termination of the rental agreement. GB 37. That does not follow. After

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someone who borrowed the car from an unlisted driver to claim a Fourth Amendment right as well. GB 37. Of course, this case only raises the question of possession and control with the *renter's* permission, not the permission of a third party. But, in any event, it is not clear why the government thinks this consequence is absurd.

the rental agreement expires, state law at some point will deem the car stolen. The same is true in regard to the renter. *See United States v. Miller*, 821 F.2d 546, 548 (11th Cir. 1987). None of that supports treating the renter and an unlisted driver differently for Fourth Amendment purposes.

II. Byrd May Also Challenge The Search Because He Had A Property Interest In The Rental Car.

Although a reasonable expectation of privacy does not require a property interest, a property interest is a second sufficient basis to establish a Fourth Amendment right in the car. OB 43-44. Here, Byrd also satisfies this second route because he had the property interest of bailee, which includes the right to exclude strangers from the car. OB 46-48.

A. As a bailee, Byrd had the right to exclude strangers from the car.

The transfer of the rental car from Reed to Byrd made Byrd a bailee. OB 46-47; *see also* 8 C.J.S. *Bailments* § 1 ("A bailment is created upon delivery of possession of goods and acceptance of their delivery"); *Price v. Brown*, 680 A.2d 1149, 1151 (Pa. 1996); *Tomko v. Sharp*, 94 A. 793, 793 (N.J. 1915). As a bailee, Byrd was obligated to exercise the requisite "degree of care to protect the property from loss." 8 C.J.S. *Bailments* § 55; OB 45-47. And as a bailee, he had the right to exclude strangers from the car and sue those who damage the car for trespass. OB 45.

The government acknowledges that the renter of a car has "property rights in the car, including the right to sue for a trespass to chattels." GB 23. But it contends Byrd had "no such rights," *id.*, because Reed was not authorized to transfer the car to Byrd. At most, however, violating that contract term merely increased Reed's potential liability for damage to the car. *See* 8A Am. Jur. 2d *Bailments* § 123. It did not invalidate Byrd's status a bailee, or his related right to exclude strangers from the car. OB 47-48; *see United States v. Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996) ("if the [unauthorized] driver of a rental car has the permission of the lessee to drive the vehicle, then he has a legitimate possessory interest" in the vehicle); *Moreno v. Idaho*, No. 15-cv-342, 2017 WL 1217113, at *5 (D. Idaho March 31, 2017); *Siverson v. Martori*, 581 P.2d 285, 288 (Ariz. Ct. App. 1978); *Revillon Freres v. Cassell Trucking Co.*, 264 N.Y.S.2d 24, 25 (App. Div. 1965); N.E. Palmer, *Bailment* 786 (1979).[10]

The government's support for the contrary view rests on a lone citation to an irrelevant Restatement

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[10] The government attempts to distinguish *Moreno* on the ground that it "addressed only the property rights of the bailee." GB 24. But the government ignores that the defendant had "constructive possession" only by virtue of the *bailment* between him and the driver-subbailee, whom the owner had not authorized to drive the car. *See Moreno*, 2017 WL 1217113, at *5. The government also attempts to distinguish *Siverson* and *Revillon Freres* on the ground that "the authority of the bailee to transfer the property to a third person was not questioned." GB 24. But nothing in those cases suggests that the bailee had the bailor's consent to subbail the property, and the "general rule" is that the bailor has not so consented. GB 22.

comment, which states that a "transaction" where one person delivers chattel to another without the owner's permission is "ineffectual." GB 24 (quoting Restatement (Second) of Torts § 229 cmt. d (Restatement)). But that section concerns only putative transfers of a "proprietary interest" in chattel, Restatement, § 229, which is a "right of *ownership* ... which would entitle the actor to retain its possession permanently," *id.* cmt. a (emphasis added). Thus, the comment's statement that the "transaction" is "ineffectual" means that a transferee can acquire no interest against a party with a *superior* interest unless he has that party's permission. But Byrd has never suggested that he had a property interest enforceable against Budget or Reed; rather, he had a limited property right to exclude *strangers* from the car.

The Restatement confirms Byrd's position. Section 222 explains that anyone "who dispossesses another of a chattel is subject to liability in trespass for the damage done." *Id.*, § 222. And that is true "irrespective of [the dispossessed party's] right to such possession." *Id.* cmt. e. Here, Byrd did not "dispossess" Budget of the car it loaned to his fiancée. But even if he had, as the person in possession, he would "have the right to retain the possession of the chattel as against the [intruder]." *Id.*

The rule that "possession is good title against all the world except those having a better title," *Anderson v. Gouldberg*, 53 N.W. 636, 636 (Minn. 1892), has a long history, *see, e.g.*, *Odd Fellows' Hall Ass'n v. McAllister*, 26 N.E. 862, 863 (Mass. 1891) ("[a possessor] of goods is entitled to keep them as against any one not having a better title."). The government urges

the Court to turn this common-law principle on its head.

Consider, for example, the government's proposed reading of *U.S. Fire Insurance Co. v. Paramount Fur Service, Inc.*, 156 N.E.2d 121 (Ohio 1959). In that case, the owner of a coat delivered it to Goldman Fur Company, making Goldman a bailee. *Id.* at 123-26; *U.S. Fire Ins. Co. v. Paramount Fur Serv., Inc.*, 145 N.E.2d 844, 846 (Ohio Ct. App. 1957). Goldman then deposited the coat with the defendant, Paramount, which ultimately lost the coat. 145 N.E.2d at 846. The Ohio Supreme Court observed that—whether or not Goldman was authorized to enter into a subbailment—Paramount served as a bailee, with a "duty of ordinary care" to Goldman with respect to the coat. 156 N.E.2d at 129. By the government's reckoning, however, Paramount had an obligation to Goldman to exercise ordinary care in protecting the coat from damage yet had no duty or right to prevent *strangers* from putting their paws all over the coat. That makes no sense; it would deprive Paramount—the holder of the duty of care—of the common law's most effective means of complying with that duty—the right to exclude strangers who might damage the chattel.

B. Byrd possessed the car and retained the right to exclude strangers from the car.

The government also contends that Byrd lacked the right to exclude strangers from the rental car because the transfer of the car "may amount to a tort," such as conversion. GB 25. The government never actually explains how potential tort liability relates to the right to exclude, but it appears to suggest that a

tortfeasor cannot have a right to exclude strangers from property he possesses. That argument fails for several reasons.

As an initial matter, Byrd's possession of the rental car did not "seriously interfere" with Budget's title and ultimate right to control the car and therefore did not constitute conversion. Restatement, § 222A(1) (requiring serious interference with property); *id.*, § 228 cmt. d (similar). Byrd drove the car within the rental period, caused no damage, and never acted in "defiance of" Budget's title. *Id.*, § 227 cmt. b. These actions, the Restatement explains, are not "enough for a conversion." *Id.* Small wonder, then, that the government cites only cases holding that violating an authorized-driver provision does *not* constitute conversion. GB 26 (citing *Dockery v. Enterprise Rent-A-Car Co.*, 796 So.2d 593, 596-99 (Fla. Dist. Ct. App. 2001); *Kender v. Auto-Owners Ins. Co.*, 793 N.W.2d 88, 95 (Wis. Ct. App. 2010)).

Moreover, the government's unstated premise—that a person who commits conversion loses any property interest in the chattel—is incorrect. While violating the terms of a bailment or committing a property tort may expand the scope of the bailee's liability, numerous cases establish that a tortfeasor in possession of chattel retains a property right to exclude strangers from the chattel and to sue for damages while the chattel remains in his possession. *See, e.g.*, *New England Box Co. v. C & R Const. Co.*, 49 N.E.2d 121, 128-29 (Mass. 1943) (observing that a tortious possessor of land may maintain action against trespasser); *Anderson*, 53 N.W. at 636 ("When it is said that to maintain replevin the plaintiff's possession must have

been lawful, it means merely that it must have been lawful as against the person who deprived him of it."); *Bartlett v. Hoyt*, 29 N.H. 317, 320 (1854) (plaintiff's possession, even after contract for sale became void, was sufficient basis for trover).

Finally, the government contends that Byrd did not have the right to exclude strangers from the rental car because the rental company could have potentially terminated the agreement and sought to repossess the car. GB 27-28. But by that reasoning anyone who is late on a car payment or who borrows a friend's car would have no right to exclude strangers from the car because he would be under the "constant threat," GB 28, of a potential repossession. Similarly, a person renting an apartment who is late in paying rent would be under threat of eviction. But no one would say that the renter behind in her rent lacks any interest in the apartment and has no Fourth Amendment rights. Again, the government's own brief demonstrates the fallacy of its arguments.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. Because this case addresses an important Fourth Amendment question, its proper resolution is of substantial concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amici curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that counsel for all parties consented to the filing of this brief.

NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

Petitioner Terrence Byrd and his fiancée (Latasha Reed), have been together for 17 years, share a home, and have had five children together. J.A. at 180. In September 2014, Petitioner's fiancée signed a car rental agreement with an authorized driver addendum that imposed restrictions on who could operate the vehicle, but explained that the "renter's spouse" was "permitted to drive the vehicle." *Id.* at 24. Petitioner's fiancée handed Petitioner the car keys and gave him express permission to drive the rental car, which he was driving when he was pulled over on Interstate 81 in Pennsylvania. *Id.* at 36–37.

The Trooper who pulled him over stated that Petitioner was acting suspiciously because (1) he was driving with his hands at the "10 and 2" position, (2) he was sitting far back from the steering wheel, and (3) he was driving a rental car. *Id.* Petitioner was stopped for failing to move into the right lane after passing a slower-moving truck. *Id.* After being pulled over, the Troopers reviewed the rental agreement. They told Petitioner that they could search the rental vehicle without his consent and without any grounds for doing so because Petitioner had no expectation of privacy in the vehicle because he was not on the rental agreement. That is incorrect. The Fourth Amendment applies to and restricts the government's

ability to search a rental car operated by a person with permission from the renter.

The Fourth Amendment is first and foremost "an 18th-century guarantee against unreasonable searches" which provides "*at a minimum* the degree of protection it afforded when it was adopted." *United States* v. *Jones*, 565 U.S. 400, 411 (2012). Thus, the meaning of the Fourth Amendment when it was adopted provides a floor of protection against unreasonable searches and seizures of an individual's "effects," which include vehicles. When the Fourth Amendment was adopted, an individual who had been entrusted with goods by another (*i.e.*, a bailee) had a possessory interest in the goods recognized at common law that could be asserted against other parties. That property interest recognized at common law is sufficient to trigger the protections of the Fourth Amendment with regard to the rental vehicle operated by Petitioner with the express consent of his fiancée, who had lawful possession of the rental vehicle.

The Fourth Amendment likewise protects against unreasonable searches and seizures where an individual has demonstrated a reasonable expectation of privacy. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Here, Petitioner is protected by the Fourth Amendment because he had a reasonable expectation of privacy in the laundry bag that he had locked in the trunk of the rental car with the keys he obtained from his fiancée. Individuals indisputably have a reasonable expectation of privacy in the contents of a locked trunk of their vehicle. That expectation of privacy likewise applies when travelers store their luggage out of sight in the trunk of a rental vehicle. The failure to comply with all of

the terms of a rental agreement does not strip an individual of his or her reasonable expectation of privacy while operating the rental vehicle. The scope of Fourth Amendment rights does not and should not depend on the terms of private rental agreements, especially where those terms have little if any bearing on the reasonable privacy interests of individuals using rental vehicles.

Finally, adoption of the court of appeal's contrary view would severely curtail the scope of the Fourth Amendment. Motor vehicle travel is a necessity for effective participation in modern society. A restriction on the Fourth Amendment's scope with regard to rental car drivers would affect a broad swath of the population, especially individuals who have come to depend on rental cars for everyday travel because they cannot afford to purchase their own vehicles. It would also disproportionately harm people of color, who are more likely to rent cars than white drivers, more likely to be pulled over by police while driving, and more likely to be searched by police after being pulled over.

ARGUMENT

I. THE FOURTH AMENDMENT APPLIES TO THE SEARCH OF A RENTAL CAR OPERATED BY AN INDIVIDUAL WITH EXPRESS AUTHORIZATION TO OPERATE THE VEHICLE.

A. The Fourth Amendment Applies To Petitioner Because He Had A Property Interest In The Rental Vehicle At Common Law.

At common law, Petitioner had a property interest in the rental vehicle sufficient to trigger the protections of the Fourth Amendment because he was operating the rental car with the express consent of his fiancée, who rented the vehicle from the car rental company.

1. By its terms, the Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. In *Jones*, this Court held that the Fourth Amendment prohibited the government from placing a tracking device on "a target's vehicle," and using "that device to monitor the vehicle's movements." 565 U.S. at 404. The Court reconfirmed "that a vehicle is an 'effect' as that term is used in the Amendment." *Id.* at 404 (citing *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977)). In doing so, the Court assumed that the vehicle was "[Jones's] vehicle" even though it was "registered to Jones's wife." *Id.* at 404 n.2. The Court explained that even if Jones were "not the owner he had at least the property rights of a bailee." *Id.* Because the government had not challenged the lower court's determination

that the vehicle's registration did not affect Jones's ability to raise a Fourth Amendment objection, the Court declined to rule on "the Fourth Amendment significance of Jones's status." *Id.*

2. The question whether a party's "status" with respect to an "effect" is sufficient to trigger the Fourth Amendment's protections—an issue left unresolved in *Jones*—is presented squarely here. To resolve that question, under *Jones*, this Court first looks to "the original meaning of the Fourth Amendment." *Id.* at 406 n.3.

As relevant here, Petitioner was given express permission to possess and use the rental car by his fiancée, who had lawful possession of the vehicle by virtue of her car rental agreement. Under these circumstances, Petitioner would have had the property rights of a bailee, *i.e.*, "one to whom goods are entrusted by a bailor." *Bailee*, Black's Law Dictionary (6th ed. 1990). As explained by Blackstone, "[b]ailment . . . is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." 2 Blackstone, *Commentaries on the Laws of England* *451. More simply, it is the "delivery of goods to another person for a particular use." *Id.* at *396. "[I]n all classes of bailment" there "is a special qualified property transferred from the bailor to the bailee, together with the possession." Joseph Story, *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law* § 93, at 71 (London, John Richards & Co. 1839) (quoting 2 Blackstone, *Commentaries on the Laws of England* *452). Neither the bailor nor the bailee has an "absolute property" right because (i) the bailor lacks "immediate possession" (that is, the bailee has "the possession"), and

(ii) the bailee's possession is "only a temporary right." 2 Blackstone, *Commentaries on the Laws of England* *396. Nevertheless, the "bailee has a sufficient interest" in a bailment "to sue in trover." Story, *supra*, § 93, at 73.

Put simply, at common law, a bailee had a legal right over the bailment *vis-a-vis* the outside world. That conclusion remains the case here even if possession of the rental car was transferred to Petitioner in a manner inconsistent with restrictions in the rental agreement. Non-compliance with a contractual requirement in the rental agreement would *not* have destroyed Petitioner's possessory interest in the rental car as to outsiders. Indeed, the common law recognized that bailees could themselves transfer goods to "sub-bailees." Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* 169 (Oxford, Clarendon Press 1888). Thus, a sub-bailment made contrary to the original bailment agreement might trigger the owner's right to recover the bailment. *Id.* But that sub-bailment would *not* affect the sub-bailee's property interest with respect to outsiders. As Justice Holmes explained,

> [T]he common law has always given the possessory remedies to all bailees without exception. The right to these remedies extends not only to pledgees, lessees, and those having a lien, who exclude their bailor, but to simple bailees, as they have been called, *who have no interest in the chattels, no right of detention as against the owner, and neither give nor receive a reward.*

O.W. Holmes, *The Common Law* 211 (Boston, Little Brown & Co. 1881) (emphasis added). Thus, even if the rental car company could have repossessed the

vehicle under the rental agreement, petitioner still would have had a possessory interest, and would have had a legal remedy against all other parties "who have no interest in the chattel[]." *Id.*

The conclusion that a bailee has a property right in a bailment likewise is consistent with the prevailing rule at common law—before, during, and after adoption of the Fourth Amendment—that possession conveyed a property right to an "effect" that allowed the possessor to exclude all private persons who did not have better title to the property. For example, in *Armory* v. *Delamirie*, the Court explained that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner." 93 Eng. Rep. 664, 664; 1 Strange 505 (K.B. 1722) (Pratt, C.J.). Likewise, in *Wilbraham* v. *Snow*, the court ruled that "possession with an assertion of title, *or even possession alone*, gives the possessor such a property as will enable him to maintain [an] action against a wrong-doer; for possession is *primâ facie* evidence of property." 85 Eng. Rep. 624, 628; 2 Wms. Saund. 47 (K.B. 1699) (emphasis added); see also *Basset* v. *Maynard*, 78 Eng. Rep. 1046, 1047; Cro. Eliz. 819, 821 (K.B. 1601) ("[A]dmitting the grant to the plaintiff had been void, yet . . . the action was maintainable; because by the cutting down of [the trees] he had possession, and a good title against the defendant and every stranger."); *Rackham* v. *Jesup*, 95 Eng. Rep. 1084, 1086; 3 Wils. 332, 334 (K.B. 1722) ("[S]upposing . . . [plaintiff] had not any lawful right to cut rushes upon the common; yet as he claimed such right . . . and gave some evidence thereof at the trial, that was sufficient . . . [since, by] claim[ing] a right to cut rushes,

[he] had gained a property therein by cutting the same."); *Webb* v. *Fox*, 101 Eng. Rep. 1037, 1040; 7 T.R. 391, 397 (1797) (holding that a bankrupt person had a title against all the world but his assignees; to do otherwise would be "an invitation to all the world to scramble for the possession of" the bankrupt person's goods); *Graham* v. *Peat*, 102 Eng. Rep. 95, 96; 1 East 244, 246 (1801) (Lord Kenyon, C.J.) ("'Any possession is a legal possession against a wrong-doer.'").

This doctrine found continued acceptance in the years leading up to and following the ratification of the Fourteenth Amendment. As the Massachusetts Supreme Court explained, "It is a leading principle that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against a wrongdoer; and accordingly it is held that a bailee without interest has a title arising *simply from his possession*." *Harrington* v. *King*, 121 Mass. 269, 271 (1876) (emphasis added); see also *Rogers* v. *Arnold*, 12 Wend. 30, 36–37 (N.Y. Sup. Ct. 1834) (describing as a "sound and incontrovertible principle" the rule that, since "the possession of a chattel is *prima facie* evidence of right, a mere stranger could not deprive the party of that possession without showing some authority or right derived from the true owner to justify the taking"); *Kennington* v. *Williams*, 30 Ala. 361, 362 (1857); *Summons* v. *Beaubien*, 36 Mo. 307, 309 (1865) ("An actual possession [of a chattel], which is a lawful one, is evidence against any one who does not show a better title."); *Burke* v. *Savage*, 95 Mass. (1 Allen) 408, 409 (1866) ("The plaintiff's possession of the property sued for was sufficient to sustain this action against any one who did not show a better title."); *Odd Fellows' Hall Ass'n* v. *McAllister*, 26 N.E. 862, 863 (Mass. 1891) (Holmes,

J.) ("[O]ne who has possession of goods is entitled to keep them as against any one not having a better title."); *Anderson* v. *Gouldberg*, 51 Minn. 294, 295–96 (1892) ("[P]ossession is good title against all the world except those having a better title."); see also Pollock & Wright, *supra*, at 93 (explaining that possession "confers more than a personal right to be protected against wrongdoers; it confers a qualified right to possess, a right in the nature of property which is valid against every one who cannot show a prior and better right").

Petitioner's possession of the rental vehicle under the express authorization received from his fiancée, who possessed the rental vehicle pursuant to a rental agreement, conveyed a property interest to Petitioner sufficient to trigger protection under the original meaning of the Fourth Amendment.

B. The Officers' Search Intruded Upon Petitioner's Reasonable Expectation of Privacy.

Petitioner likewise had a reasonable expectation of privacy in the locked trunk of the rental car that his fiancée authorized him to operate, thereby triggering the protections of the Fourth Amendment.

1. In *Katz* v. *United States*, this Court held that the government's "activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353. In his concurring opinion, Justice Harlan set forth his understanding of the governing Fourth Amendment rule, that is, a "twofold requirement, first that a person have exhib-

ited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361; see, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735, 740–741 (1979) (applying twofold requirement set forth in Justice Harlan's concurring opinion).

The Court's cases confirm that a reasonable expectation of privacy often is strongest in the home. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). That societal expectation of privacy extends not only to those who *own* a home, but also to houseguests who themselves are exercising dominion over the home. *Jones* v. *United States*, 362 U.S. 257 (1960).

The reasonable expectation recognized by society likewise extends to vehicles, which are "effects" protected under the Fourth Amendment. *Jones*, 565 U.S. at 400, 411. As is the case with a home, a reasonable expectation of privacy in a vehicle does not depend on vehicle ownership. To be sure, societal expectations of privacy do not extend to "a person present in a stolen automobile at the time of a search," *Rakas* v. *Illinois*, 439 U.S. 128, 141 n.9 (1978), but the Fourth Amendment has been held to protect the privacy interests of passengers in taxicabs and commercial buses. See *Katz*, 389 U.S. at 352 ("No less than an individual in . . . a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment") (citing *Rios* v. *United States*, 364 U.S. 253 (1960)); *Bond* v. *United States*, 529 U.S. 334, 338–39 (2000) ("When a bus passenger places a bag in an overhead bin . . . [h]e does not expect that

other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.").

2. Petitioner had a reasonable expectation of privacy in the rental car that he was operating with express permission and authorization from his fiancée.

Petitioner's expectation of privacy is thus akin to that of the houseguest protected by the Fourth Amendment in the watershed case of *Jones* v. *United States*. As this Court subsequently explained in *Rakas*, the expectation of privacy of the houseguest in *Jones* was reasonable because (1) he "had permission to use the apartment of his friend," (2) he had "a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment," and (3) "[e]xcept with respect to his friend, [the houseguest] had complete dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149.

The same analysis applies to Petitioner's reasonable expectation of privacy in the rental car. As in *Jones*, petitioner had permission to use the rental vehicle of his fiancée. See J.A. at 182. Petitioner was given express permission to operate the car by his fiancée, who had possession and control of the vehicle by virtue of an agreement with the rental car company. *Id.* at 18–19, 182. Further, as in *Jones*, petitioner was given a key so that he could operate the vehicle and lock his possessions in the trunk beyond the view of third parties. See *id.* at 182. Finally, as in *Jones*, with the exception of his fiancée and the rental company, petitioner "had complete dominion and control" over the rental vehicle and thus "could exclude others from it." *Rakas*, 439 U.S. at 149. As in *Jones*, Petitioner had a reasonable expectation of privacy in

a vehicle that he did not own, but over which he exercised lawful dominion and control.

3. Petitioner's expectation of privacy is not rendered unreasonable because he did not meet the definition of an authorized driver under the terms of the rental agreement signed by his fiancée. Indeed, if the scope of the Fourth Amendment were made to depend on the terms of private contracts, an individual's Fourth Amendment rights would become a patchwork that varies from state-to-state.

For example, under state law in Illinois, Iowa, Missouri, Nevada, New York, Oregon, and Wisconsin, spouses automatically are authorized drivers regardless of whether they are listed on the rental car contract.[2] Under Wisconsin law, authorized drivers automatically include the renter's employer, employee and coworker, any unlisted driver operating the rental car during an emergency, and valet parking attendants.[3] Illinois law allows for the renter's employer, employee, and coworker to be authorized drivers, while Iowa, Nevada and Oregon account only for an *employer* or coworker, and Missouri only for an *employee* or coworker.[4] Illinois, Missouri, New York and Oregon make unlisted individuals into authorized drivers in emergency situations, but New York speci-

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[2] *See* 625 Ill. Comp. Stat. § 27/10 (1997); Iowa Code § 516D.3(1)(c) (2016); Mo. Rev. Stat. § 407.730(2)(b) (2007); Nev. Rev. Stat. § 482.31515(2) (1989); N.Y. Gen. Bus. Law § 396-z(1)(a)(ii) (Gould 2018); Or. Rev. Stat. § 646A.140(1)(b) (2015); Wisc. Stat. § 344.57(2)(a) (2005).

[3] Wisc. Stat. § 344.57(2)(c)-(d).

[4] 625 Ill. Comp. Stat. § 27/10; Iowa Code § 516D.3(1)(d); Nev. Rev. Stat. § 482.31515(3); Or. Rev. Stat. § 646A.140(1)(c); Mo. Rev. Stat. § 407.730(2)(c).

fies that the driver must be heading "to a medical facility," and Illinois requires the individual to be "driving directly to a medical or police facility."[5]

For these classes of individuals, the Court of Appeals' approach makes the Fourth Amendment's protections turn entirely on the law of the particular state in which the search occurred. For example, in New York, the renter's spouse and any emergency driver heading to a *medical* facility enjoy Fourth Amendment rights even if unlisted on the rental car contract, but not the renter's employer, employee, or coworker, nor an emergency driver heading to a *police* facility.[6] But the spouse and the emergency driver would lose Fourth Amendment protections in other states.

This Court, however, has made clear that distinctions among the laws of different states cannot control the scope of the Fourth Amendment's protections. *California* v. *Greenwood*, 486 U.S. 35, 36 (1988). In *Greenwood*, respondent argued that the scope of the Fourth Amendment's protections should be governed by the requirements of California law, which, at the time, made warrantless search and seizure of an individual's garbage illegal. *Id.* at 43. This Court disagreed and expressly rejected the notion that "whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law . . . in which the search occurs." *Id.* In doing so, this Court ruled that the scope of the Fourth Amendment does

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[5] 625 Ill. Comp. Stat. § 27/10; Mo. Rev. Stat. § 407.730(2)(d); N.Y. Gen. Bus. Law § 396-z(1)(a)(iii); Or. Rev. Stat. § 646A.140(1)(d).

[6] N.Y. Gen. Bus. Law § 396-z(1)(a).

not depend on "concepts of privacy under the laws of each State." *Id.* at 44

Nor should societal expectations of privacy depend on the specific terms in individual rental car agreements. A typical rental car contract contains multiple pages of complex terms and conditions that are not subject to negotiation. These contracts may contain a list of restrictions which will "automatically terminate" the renter's agreement upon violation of a single restriction, thereby converting the renter into an unauthorized driver.[7] These restrictions are wide ranging and vary from prohibitions on texting and making cell phone calls while driving to prohibitions on driving on unpaved roads or off-road.[8]

Although a violation of one or more of these contractual provisions may affect the relationship between the renter and the rental company, such a violation should not control or negate the scope of privacy interests that society affords to individuals lawfully operating rental vehicles. For example, under the court of appeals' approach, a driver who violates a rental agreement by using a cellphone while driving would no longer have a reasonable privacy interest in the rental car and the rental car could be searched, without any particular suspicion of criminal activity

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[7] *E.g.*, Avis, *Rental Term and Conditions United States and Canada* (Apr. 20, 2016), https://www.avis.com/car-rental/html/global/en/terms/AV_Preferred_Rental_Terms_R1_4.20.16.pdf; Budget, *Fastbreak Terms and Conditions United States & Canada* (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.

[8] *E.g.*, Avis, *supra* note 7; Alamo, *Alamo Online Check-In Terms*, https://www.alamo.com/en_US/car-rental/checkin/terms-and-conditions.html.

and without a court-issued warrant. The driver's Fourth Amendment rights would be extinguished the moment the driver makes the cell phone call.[9] But "giv[ing] police the power to conduct such a search" whenever they perceive a violation of a rental restriction would "creat[e] a serious and recurring threat to the privacy of countless individuals" and "implicat[e] the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona* v. *Gant*, 556 U.S. 332, 345 (2009).

More fundamentally, an approach based almost entirely on the four corners of a private contract would not be faithful to the Fourth Amendment. The restrictions in modern private contracts do not control society's "widely shared social expectations" of privacy. *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006). Instead of reflecting social norms of privacy, the unlisted-driver restriction reflects the rental car industry's efforts to address liability risk relating to their vehicles. 1 Irvin E. Schermer & William Schermer, Automobile Liability Insurance § 6:18 (4th ed. 2008). In fact, the car rental industry might prohibit such conduct precisely because the industry anticipates that many renters will inevitably engage in the conduct. See *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 370 N.Y.S.2d 675, 677 (1975).

Indeed, for purposes of insurance coverage, a substantial number of courts have ruled that the use of a rental car by a permittee, with express authorization

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[9] Budget, *Fastbreak Terms and Conditions United States & Canada* (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.

from the renter, renders the permittee an authorized user. *E.g.*, *Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982) (per curiam) (unlisted driver "was covered" by the contract's insurance clause because "he had permission from the named" driver "to drive the automobile," despite the rental contract's prohibition of unlisted drivers); *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 350 N.E.2d 616, 617 (N.Y. 1976) (per curiam) ("recogniz[ing]" the "realities and exigencies of commercial automobile rentals"). Other courts have deemed the renter to have implied permission to allow an unlisted individual to operate the rental car on the basis of the renter's right to unrestricted use of the vehicle. *E.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 532–33 (Mo. Ct. App. 1994); *BATS, Inc.* v. *Shikuma*, 617 P.2d 575, 577–78 (Haw. Ct. App. 1980). In a related vein, multiple courts have explained that use by unauthorized persons is a *foreseeable* aspect of rental, and they have declined to allow rental companies to exempt themselves from operation of insurance law through contract provisions. See, *e.g.*, *Enter. Leasing Co.* v. *Allstate Ins. Co.*, 671 A.2d 509, 514 (Md. Ct. App. 1996) ("[I]t is foreseeable that unauthorized permittees will drive rental vehicles and that they will be involved in accidents."); *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996) ("[W]hen there is a general, broad admonition not to let anyone else drive the car" or even an "express prohibition against third drivers," it is "reasonably foreseeable" that "the permittee would allow someone else to drive the car."); *Motor Vehicle Accident Indemnification Corp.* v. *Cont'l Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 184 (N.Y. 1974).

In short, the scope of the Fourth Amendment is not dependent upon the restrictions in a private contract, but on the circumstances surrounding the use of the rental and on what society recognizes to be reasonable and worthy of protection.

II. THE RULING BELOW DISPROPORTIONATELY HARMS LOW-INCOME INDIVIDUALS AND PEOPLE OF COLOR.

A. The Ruling Below Restricts Fourth Amendment Protections For A Ubiquitous Part Of The Economy That Is Critically Important To Low-Income Individuals.

The ruling by the court of appeals severely limits the scope of the First Amendment in a critically important area, and, if affirmed, would harm low-income individuals who rely on rental cars to function in our car-dependent society.

1. America is a nation of drivers. More than 87.5 percent of Americans aged 16 and older reported driving sometime during the past year.[10] Each year, these drivers spend, on average, the equivalent of seven 40-hour work weeks behind the wheel. Tefft, *supra* note 10, at 14. These statistics come as no surprise because, for the vast majority of Americans, cars are indispensable for everyday life. According to the National Household Travel Survey, over 83 per-

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[10] Brian Tefft et al., AAA Found. for Traffic Safety, *American Driving Survey 2014-2015* at 7 (2016), https://www.aaafoundation.org/sites/default/files/AmericanDrivingSurvey2015.pdf.

cent of our travel occurs in household cars and other privately owned vehicles.[11]

We use cars to buy groceries, go to the post office, visit our accountants, attend weddings and funerals, participate in community meetings, and accomplish countless other day-to-day tasks. In 2009—the most recent year for which the National Household Travel Survey has data—we made 146 billion trips for these types of family or personal errands. Fed. Highway Admin., *supra* note 11, at 19. We also made 83 billion trips for social and recreational purposes, 56 billion trips to and from work, and 27 billion trips to school or church. *Id.* We drive 28.97 miles per day and own 1.86 vehicles per household. *Id.* at 10, 34. We are, in every respect, "largely dependent on the automobile."[12]

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[11] *See* Fed. Highway Admin., U.S. Dep't of Transp., *Summary of Travel Trends: 2009 National Household Travel Survey* 19 (2011), http://nhts.ornl.gov/2009/pub/stt.pdf. The National Household Travel Survey is a national survey conducted by the U.S. Department of Transportation every 6 to 8 years to collect data on travel and transportation patterns in the United States. It was last completed in 2009. The survey found that in 2009, 83.4% of "person trips" were made by privately owned vehicle, where "person trip" is defined as "a trip from one address to another by one or more persons . . . . For example, four persons traveling together in one auto are counted as four person trips." *Id.* at A–10. The 2016 National Household Travel Survey was recently completed and the results are scheduled for release in 2018. *See* Fed. Highway Admin., U.S. Dep't of Transp., *National Household Travel Survey*, http://nhts.ornl.gov/.

[12] *See* Adie Tomer, *America's Commuting Choices: 5 Major Takeaways from 2016 Census Data*, Brookings (Oct. 3, 2017), https://www.brookings.edu/blog/the-avenue/2017/10/03/americans-commuting-choices-5-major-takeaways-from-2016-census-data/.

Rental cars serve a critical function in our car-dependent society. Hand-in-hand with our dependence on cars comes our dependence on rental cars. Demand for rental cars is exemplified by the size and strength of the rental car industry. Both fleet size and industry revenue have climbed steadily over the last ten years.[13] As of 2016, there were 2,313,027 rental cars in service in the United States, operating at 20,469 locations, and bringing in revenue of $28 billion.[14] America is not only a nation of car owners, but also a nation of rental car users.

The 2.3 million rental cars currently in service are called on for a multitude of purposes. Of course, rental cars are often rented by deplaning passengers looking for a car to drive while travelling away from their home city. But approximately half of the rental car industry's revenue is earned at "neighborhood locations" in the renter's home city for reasons unrelated to air travel.[15] Would-be drivers rent from neighborhood locations to attend special occasions, transport unwieldly objects, to move houses. In addition, car owners often use rental cars as replacement vehicles while their own cars are in the auto shop. Given that there are millions of car accidents each

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[13] *See* Auto Rental News, *U.S. Car Rental Revenue and Fleet Size Comparisons*, http://www.autorentalnews.com/fileviewer/2452.aspx.

[14] *See* Auto Rental News, *2016 U.S. Car Rental Market: Fleet, Locations and Revenue*, http://www.autorentalnews.com/fileviewer/2451.aspx.

[15] *Vacation Nation: How Tourism Benefits Our Economy: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy & Commerce*, 133th Cong. 4 (2013) (statement of Brian D. Rothery, Assistant Vice President of Government & Public Affairs for Enterprise Holdings, Inc.).

year and the average collision repair takes two weeks, replacement rentals can be indispensable for individuals who own a car that they depend on for their daily routine.[16]

The modern car-sharing phenomenon portends an even greater role for rental cars in our society going forward. Car-sharing programs allow people to rent cars 24 hours a day, seven days a week, typically on an hourly, daily, or overnight basis.[17] Renters pay a membership fee in exchange for access to the company's fleet of cars, which are parked in designated places around the city. *Supra* note 17. Members reserve cars online and use their membership cards to unlock the car and access the keys. *Id.* According to Zipcar, this type of carsharing is ideal for people who, among other things, "want to save money," "need a second car," "need a big car for a big job," or "take public transit, but need a car sometimes."[18] Americans are heeding this call: as of 2014, there were estimated to be about 19,115 car-sharing cars in the United States, shared by about 996,000 members, and the carsharing industry was estimated to have an annual revenue of approximately $400 million.[19]

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[16] *See* Enterprise, *Rent After an Accident*, https://www.enterprise.com/en/car-rental/rent-a-car-after-an-accident.html.

[17] *See* Enterprise, *Enterprise CarShare Frequently Asked Questions*, https://www.enterprisecarshare.com/us/en/faq.html.

[18] Zipcar, *Is Zipcar for me?*, http://www.zipcar.com/is-it.

[19] Susan A. Shaheen & Adam Cohen, *Innovative Mobility Carsharing Outlook: Carsharing Market Overview, Analysis, & Trends*, Berkeley–Transp. Sustainability Res. Ctr. (2014), http://76.12.4.249/artman2/uploads/1/Fall_2014_Carsharing_Outlook_Final_1.pdf; Chris Brown, *CarSharing: State of the Market and Growth Potential*, Auto Rental News (Mar./Apr. 2015),

Car rental, just like car ownership, plays a critical role in our society and serves millions of Americans every year—millions of Americans whose lives will be affected by a ruling that the Fourth Amendment applies to rental car users only if the terms of the rental car agreement have been satisfied.

2. The rental car exemption adopted by the court of appeals would create a substantial void in the protections afforded by the Fourth Amendment that would disproportionately affect low-income individuals.

Even though car usage is critical to functioning in American society—especially in suburban and rural communities—many low income people do not own a car. Just 76% of households in poverty own a car, compared to 98% of households earning over $100,000 per year.[20] The correlation between low income and low car ownership makes sense: for many, owning a car is prohibitively expensive. The average cost to own and operate a car in 2014— which includes costs for vehicle purchase, gasoline, insurance, maintenance, and repairs—was $8,698.[21] "[T]he high sticker price of vehicles [and] increased prices at the

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http://www.autorentalnews.com/article/story/2015/03/carsharing-state-of-the-market-and-growth-potential.aspx.

[20] Fed. Highway Admin., U.S. Dep't of Transp., *Mobility Challenges for Households in Poverty: 2009 National Household Travel Survey* 2 (2014), http://nhts.ornl.gov/briefs/PovertyBrief.pdf.

[21] Bureau of Transp. Statistics, U.S. Dep't of Transp., *Passenger Travel Facts and Figures 2016* at 66, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/PTFF%202016_full.pdf.

pump . . . pose a financial burden to the mobility of all households, especially those in poverty."[22]

A lack of resources to purchase a car has far-reaching consequences. "Many people without access to a personal vehicle, especially people who are poor, have difficulty reaching stores, services, and workplaces outside of their immediate neighborhoods."[23] The problem is compounded because more U.S. households in poverty live in suburbs, where "fewer transit options" mean fewer alternatives to using a car.[24] One study found that "nearly all zero-vehicle households live in neighborhoods with transit service, but those routes only connect them to 40 percent of jobs within 90 minutes."[25] Car rentals offer a solution for low-income individuals who cannot afford to maintain a car but who need to use a car from time-to-time.

Contrary to the "commonly held misconception that car rental is a luxury reserved for the wealthiest individuals," low-income individuals comprise a significant portion of the rental car market.[26] A rule re-

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[22] *See* Fed. Highway Admin., *supra* note 20, at 1.

[23] Bureau of Transp. Statistics, U.S. Dep't of Transp., *Transportation Statistics Annual Report 2016* at 49, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/TSAR_2016_rev.pdf.

[24] *See* Fed. Highway Admin, *supra* note 20, at 3.

[25] Adie Tomer & Joseph Kane, *Car Remains King and Barrier to Economic Opportunity*, Brookings (Oct. 23, 2014), https://www.brookings.edu/blog/the-avenue/2014/10/23/cars-remain-king-and-barrier-to-economic-opportunity/.

[26] *See* Kevin Neels, The Brattle Grp., *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 3 (2010),

stricting the Fourth Amendment's scope as applied to rental cars would leave those low-income individuals, who are disproportionately unable to purchase a car and thus must depend on rentals cars, with less Fourth Amendment protection than their more affluent, car-owning neighbors. Likewise, low-income people also are more likely to be second unpermitted drivers. For example, many rental car agencies require a credit or debit card at the start of a rental, and may limit the locations that accept debit cards or impose additional restrictions when a debit card is used.[27] But low-income individuals are less likely to own a credit card than those who are more affluent, and many of the poorest households do not have any bank account at all.[28] Low-income individuals who

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http://www.brattle.com/system/publications/pdfs/000/004/845/original/Effects_of_Discriminatory_Excise_Taxes_on_Car_Rentals_Neels_June_10_2010.pdf?1378772134 (concluding that households earning less than $25,000 per year paid 7% of rental excise taxes in 2008, and houses earning $25,000 to $49,999 paid another 12%).

[27] *See, e.g.*, Hertz, *Rental Qualifications and Requirements: Forms of Payment*, https://www.hertz.com/rentacar/reservation/reviewmodifycancel/templates/rentalTerms.jsp?KEYWORD=PAYMENT&EOAG=LAX ("When a debit card is accepted as form of payment, at the start of the rental, two (2) forms of identification must be presented."); Avis, *Avis Car Rentals FAQs: Forms of Payment*, https://www.avis.com/en/customer-service/faqs/usa/requirement-for-renting ("[S]ome Avis locations do not accept debit cards as a form of payment.").

[28] Fed. Deposit Insurance Corp., *2011 FDIC National Survey of Unbanked and Underbanked Households* 14, https://www.fdic.gov/householdsurvey/2012_unbankedreport.pdf ("Almost three in ten households (28.2 percent) with annual income below $15,000 do not have a bank account, while about one in ten households (11.7 percent) with income between $15,000 and $30,000 are unbanked."); Daniel Indiviglio, *What Credit*

cannot satisfy the charge card prerequisite to renting may be forced to ask friends or family to rent on their behalf, and thus may be unable to comply with the requirements imposed in rental contracts to obtain authorization to operate a rental vehicle.

B. The Ruling Below Disproportionately Harms People Of Color, Who Are More Likely To Be Pulled Over By Police While Driving And To Be Searched After Being Pulled Over.

The court of appeals' restriction of Fourth Amendment rights for rental car drivers likewise would have a disproportionate impact on Black and Hispanic drivers because they are much more likely to rent cars than white drivers. "African Americans generate over *four times* as many retail rental transactions as otherwise comparable Caucasian[s]." Kevin Neels, The Brattle Grp., *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 4–7 & tbls. 2, 4 (2010), http://www.brattle.com/system/publications/pdfs/000/004/845/original/Effects_of_Discriminatory_Excise_Taxes_on_Car_Rentals_Neels_June_10_2010.pdf?1378772134. And Hispanics are also "substantially more likely to rent [cars] than Caucasian[s]." *Id.*

Moreover, Black drivers are more likely to be stopped by the police than white drivers. According to data from the Department of Justice's Bureau of

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Cards Cost the Poor, The Atlantic (July 27, 2010), https://www.theatlantic.com/business/archive/2010/07/what-credit-cards-cost-the-poor/60505/ ("It's fairly well-known that less affluent people have trouble getting credit cards, and when they do they often are forced to pay higher interest rates").

Justice Statistics, "Relatively more black drivers (13%) than white (10%) and Hispanic (10%) drivers were pulled over in a traffic stop during their most recent contact with police." Lynn Langton & Matthew Durose, Bureau of Justice Statistics, U.S. Dep't of Justice, *Police Behavior During Traffic and Street Stops, 2011* at 1 (2013), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf. Specifically, a black driver is about 30 percent more likely to be pulled over than a white driver. Moreover, Black drivers are more likely to be pulled over for amorphous reasons like "record check[s]"—14 percent of Black drivers were pulled over for record checks according to the DOJ data, versus only 9 percent of white drivers who were pulled over for that reason. *Id.* at 4. And officers "did not give [any] reason for the stop" at all for 4.7 percent of Black drivers, but that number was only 2.6 percent for white drivers. *Id.*

The problem is pervasive and consistent across the United States. A group of scholars at Stanford University studied 60 million state patrol stops conducted in 20 U.S. states between 2011 and 2015, using data collected by state law enforcement agencies. *See* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* 1–2, https://5harad.com/papers/traffic-stops.pdf.[29] They found that "black drivers are stopped more often than white drivers relative to their share of the driving-age population." *Id.* at 1.

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[29] The twenty states are Arizona, California, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Vermont, Washington and Wisconsin. *See id.* at 3.

Specifically, "[a]fter controlling for gender, age, location, and year, . . . blacks are stopped at 1.4 times the rate at which whites are stopped." *Id.* at 5.

And both Black and Hispanic drivers are more likely to be searched when they are stopped by police. According to the Department of Justice data, only 2.3% of white drivers who were stopped by police were searched, compared to 6.3% of Black drivers and 6.6% of Hispanic drivers. Langton, *supra*, at 9. The Stanford analysis of 60 million traffic stops found that across jurisdictions "black and Hispanic motorists are consistently searched at higher rates than white drivers." Pierson, *supra*, at 6. Aggregating across all states, white drivers were searched in 2.0% of stops, compared to 3.5% of stops for Black drivers and 3.8% for Hispanic drivers. *Id.* Thus, "[a]fter controlling for stop location, date and time, and driver age and gender," the study found "black and Hispanic drivers have approximately twice the odds of being searched relative to white drivers." *Id.* See also Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 Duke F. L. Soc. Change 21, 37, 39 (2017) (analyzing over 55 million traffic stops across thirteen states and finding that Black drivers were 2.51 times as likely to be searched than white drivers and Hispanic drivers were 3.14 times as likely to be searched as white drivers).

Thus, any ruling that limits the Fourth Amendment's application to rental-car drivers will disproportionately harm people of color, who are significantly more likely to be pulled over by the police while driving and more likely to be searched by the police after they have been pulled over.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 16-1371

In the Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, DELAWARE, IDAHO, INDIANA, KENTUCKY, NEBRASKA, NEVADA, NEW JERSEY, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* STATES

Amici are the States of Arizona, Arkansas, Delaware, Idaho, Indiana, Kentucky, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Utah.[1]

The question presented in this case is whether individuals who are not covered by a rental agreement may nonetheless assert the same expectations of privacy as the person who has actually rented the car. State law-enforcement authorities have an interest in the answer.

Federal appellate courts have "stressed that drug couriers may commonly drive other people's rental cars, [using] so called third-party rentals," as Petitioner Terrence Byrd did here. *United States v. Winters*, 782 F.3d 289, 300 (6th Cir. 2015) (internal quotation marks omitted). Additionally, of particular concern to border States like Arizona, courts also have long acknowledged that human traffickers and alien smugglers often use rental cars to accomplish their crimes. *See, e.g.*, *United States v. Garcia-Barron*, 116 F.3d 1305, 1306–07 (9th Cir. 1997).

Amici States, which include all three States in the Third Circuit, thus have a substantial interest in the Court's disposition of the case.

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[1] *Amici* submit this brief pursuant to Rule 37.4.

SUMMARY OF THE ARGUMENT

The Third Circuit in this case applied the rule that an overwhelming majority of federal courts have endorsed: "the sole occupant of a rental vehicle" who "is not named in the rental agreement . . . has no expectation of privacy and therefore no standing to challenge a search of the vehicle." Pet. App. 8a (citing *United States v. Kennedy*, 638 F.3d 159, 165–67 (3d Cir. 2011) (collecting cases)). Byrd—who was caught transporting 49 bricks of heroin and body armor in a rental car that he was not authorized to drive—urges the Court to adopt a murkier rule that would tie the lawfulness of a search to the "permission" of the actual renter rather than the objective and immediately-discernable rental agreement. Pet. Br. 17. This change is necessary, Byrd argues, because the majority rule "[g]iv[es] police carte blanche" to "stop all rental cars so that they can check whether the driver is on the rental agreement and then proceed to search every inch of the car without any suspicion or justification, if the driver is not listed." *Id.* at 16. He also contends that the existing rule "fail[s] to provide clear and administrable guidance to trained officers in the field." *Id.* Byrd's claims find no support in law or logic.

I. For nearly half a century, this Court has "held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop" only "when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The mere fact that someone is driving a rental car—even one rented to a third party—is not alone sufficient to supply such

reasonable suspicion. *See, e.g.*, *United States v. Williams*, 808 F.3d 238, 247-53 (4th Cir. 2015) ("accept[ing] that, as a general proposition, some drug traffickers use rental cars" but noting that "Defendants' use of a rental car . . . is of minimal value to the reasonable-suspicion evaluation"); *United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998) (similar). These courts have not dispatched with the bedrock reasonable suspicion requirement on the bare fact that someone is driving a rental car. Nor could they; this Court has authorized no such exception. Byrd's claim that the majority rule cuts police officers a blank check to stop and search "all rental cars" is misplaced for this reason alone. Pet. Br. 16.

II. Experience also belies the calamity Byrd predicts. Byrd claims "[t]he facts of this case illustrate all too starkly that each of [the] 115 million car rentals" apparently made each year "may be targeted for suspicionless searches if the Third Circuit's rule that unlisted drivers have no Fourth Amendment rights is affirmed." *Id.* at 39. But Byrd's dire predictions are based on his dim view of law enforcement and contradict the experience of jurisdictions that follow the majority rule. Neither Byrd nor any of his *amici* points to a single case in the Third Circuit in the six-plus years since the court adopted that rule in which someone was "targeted for a suspicionless search" simply for driving a rental car.

III. Finally, the majority rule adopted by the Third Circuit (that a driver has no expectation of privacy in a rental car he is not authorized to drive) provides far "clear[er] and [more] administrable guidance to trained officers in the field" than the one Byrd advocates ("that

a person has a reasonable expectation of privacy in a vehicle, if she has possession and control over it with the renter's permission"). Pet. Br. 16, 43. As a matter of common sense, it will be far more "readily apparent to an officer at the scene" whether a driver is listed on a rental agreement than whether the he is driving with the (absent) renter's permission. *Id.* at 43. It is Byrd's rule, not the majority one, that "is impractical to apply." *Id.* at 40.

ARGUMENT

Byrd's Petition obfuscates existing Fourth Amendment protections and elevates speculation over experience. This Court should decline the invitation to add a layer of Fourth Amendment complexity in the form of a factual question over whether the actual renter granted permission.

I. Byrd Is Wrong That the Majority Rule Gives Police Officers Carte Blanche to Stop and Search All Rental Cars

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809–10 (1996). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Id.* at 810. Such "investigatory stop[s]" therefore must be supported by an officer's "reasonable, articulable suspicion that criminal activity is afoot." *Wardlow*, 528 U.S. at 123.

Courts have "stressed that drug couriers may commonly drive other people's rental cars, [using] so called third-party rentals," as Petitioner Terrence Byrd did here. *Winters*, 782 F.3d at 300 (internal quotation marks omitted); *see also United States v. Contreras*, 506 F.3d 1031, 1036 (10th Cir. 2007) ("credit[ing] the idea that drug couriers often use third-party rental cars"); *United States v. Ramdihall*, 859 F.3d 80, 92 (1st Cir. 2017) (quoting testimony "that when individuals in a rental vehicle are transporting drugs, 'most of the time, the renter of the vehicle is never with the vehicle'").

Indeed, federal courts have widely acknowledged that drug traffickers like Byrd often use car rentals to thwart drug-interdiction efforts, *e.g.*, *United States v. Khanalizadeh*, 493 F.3d 479, 481 (5th Cir. 2007); *United States v. Coleman*, 603 F.3d 496, 500 (8th Cir. 2010), and avoid asset forfeiture, *e.g.*, *United States v. Finke*, 85 F.3d 1275, 1277 (7th Cir. 1996); *United States v. Tramunti*, 513 F.2d 1087, 1102 (2d Cir. 1975). Courts have similarly recognized that human traffickers and alien smugglers often use rental cars. *See, e.g.*, *Garcia-Barron*, 116 F.3d at 1306–07; *United States v. Korb*, 464 F.2d 456, 457 (9th Cir. 1972) ("The officers knew . . . that a rented car is a common modus operandi among marijuana, narcotics, and alien smugglers.").

Because rental cars are often used by drug and human traffickers, the fact that someone is using a rental car may—when combined with other factors—support reasonable suspicion. That application of *Terry* is consistent across the circuits that apply the majority rule. *See, e.g.*, *Contreras*, 506

F.3d at 1035–36 (officer had reasonable suspicion to extend a stop based on "the fact that [defendant] was driving a rental car—which Sergeant Bauer knew to be 'often used by narcotics traffickers . . . [because] it can't be seized,'" among other factors); *United States v. Coggins*, 986 F.2d 651, 655 (3d Cir. 1993) (brief "duration of a car rental" one of five factors constituting reasonable suspicion); *United States v. Kye Soo Lee*, 898 F.2d 1034, 1040 (5th Cir. 1990) ("the fact that the truck had been rented to an unknown third party" one of eight factors contributing to reasonable suspicion for a prolonged stop); *cf. Williams*, 803 F.3d at 247–53 (even in combination with other factors, use of a rental car did not contribute to reasonable suspicion).

The same is true in the circuits that apply the rule Byrd advocates. *See, e.g.*, *Garcia-Barron*, 116 F.3d at 1306–07 (border patrol agent's "experience in stopping rental cars" involved in human smuggling coupled with "the time of day, the route taken . . . the fact that the area was known for alien smuggling" created reasonable suspicion); *United States v. Coleman*, 603 F.3d 496, 500 (8th Cir. 2010) (finding reasonable suspicion where, among other factors, officers saw a car with "an out-of-state license plate [that] can be indicative that the vehicle is a rental").

And it is true in circuits that have not yet chosen sides. *See, e.g.*, *Finke*, 85 F.3d at 1280 ("in light of his experience as a police officer and his knowledge of drug courier activity," officer had reasonable suspicion where "1) the car was a rental; 2) it had been driven to California and back in five days; 3) the passenger compartment appeared as if they had been living in it . . . ; 4) [the driver] was extremely nervous; and

5) [the renter] appeared to be feigning grogginess in an attempt to avoid answering questions").

But the fact that someone is driving a rental car will not necessarily support reasonable suspicion even in combination with other factors. In *Williams*, for example, the Fourth Circuit concluded that the defendants' use of a rental car "on a known drug corridor at 12:37 a.m." and with "state[d] travel plans [that] were inconsistent with, and would likely exceed, the due date for return of the rental car" were insufficient to support reasonable suspicion to detain defendants after completing a traffic stop. *Williams*, 808 F.3d at 247–53. The Fourth Circuit—one of the jurisdictions that applies the majority rule—specifically noted that "Defendants' use of a rental car . . . is of minimal value to the reasonable-suspicion evaluation," even though the court "accept[ed] that, as a general proposition, some drug traffickers use rental cars." *Id.* at 247.

Similarly, in *United States v. Boyce*, 351 F.3d 1102 (11th Cir. 2003), the Eleventh Circuit concluded that an officer lacked "a reasonable and articulable suspicion sufficient to detain [the defendant] beyond [an] initial traffic stop" even though he was "driving a rental car on a known drug corridor" and "planning to return the car two days late." *Id.* at 1108–09. The court noted that "it raises reasonable suspicion that the car is stolen if the rental agreement shows that the person detained is not authorized to drive the vehicle." *Id.* at 1109 (citing *United States v. Pruitt*, 174 F.3d 1215, 1220 (11th Cir. 1999)). Likewise, in *Beck*, the Eighth Circuit "[held] that there was nothing inherently suspicious in [the defendant's] use of a

rental vehicle, even though rented by a third person, to travel." *Beck*, 140 F.3d at 1137. Even combined with six other factors, the court concluded that reasonable suspicion was lacking for detention beyond an admittedly valid stop for following another vehicle too closely. *Id.*

If the combinations of factors in *Williams*, *Boyce*, and *Beck* were not sufficient to create reasonable suspicion for more than a traffic stop, then *a fortiori*, the mere fact that someone is driving a rental car cannot, by itself, support an investigatory stop. *See United States v. Jefferson*, 906 F.2d 346, 348 n.3 (8th Cir. 1990) (facts that defendants "were parked at an interstate rest stop in a rental car from Minnesota . . . are clearly not sufficient to establish a reasonable suspicion of criminal activity").

Byrd ignores this important check on investigatory stops, and he is simply wrong that the majority rule "would encourage the police to pull over every rental car they see" or give police "carte blanche" to "stop all rental cars." Pet. Br. 4, 16. The Fourth Amendment already forbids such suspicionless searches and seizures, regardless of the outcome in this case.

II. The Third Circuit's Experience Shows That Byrd Is Wrong About the Calamitous Effects That Adopting the Majority Rule Would Supposedly Have

Byrd also overstates the "far-reaching effects" the Third Circuit's rule would supposedly have. Pet. Br. 38. He claims that "[i]f unlisted drivers have no Fourth Amendment protection in the car, law enforcement officers would have an incentive to pull over rental cars

whenever the driver commits a technical traffic infraction; check whether the driver is on the rental agreement; and then, if it turns out the driver is unlisted, proceed to search every inch of the car without probable cause to believe that the car contains evidence of a crime." *Id.* Adopting the Third Circuit's rule, Byrd argues, "would skew police incentives toward conducting widespread suspicionless searches of rental cars," "open[ing] the door to suspicionless searches of millions of cars every year." *Id.* at 38, 40.

Byrd never explains why the rule he proposes—*i.e.*, that unauthorized drivers lack an expectation of privacy in a rental car *unless they have the renter's permission*—would create different incentives than the majority rule allegedly does. After all, an officer's chance of getting lucky and stopping someone without a reasonable expectation of privacy still exists. But if Byrd were right about the incentives the Third Circuit's rule creates and how police officers would respond, then surely the effects of those perverse incentives would already be on full display in the Third Circuit. That is especially true if, as Byrd contends, "the police [in the Third Circuit] are well aware of this Fourth Amendment loophole." Pet. Br. 4.

Experience tells a different story. There is no epidemic of police officers in the court below (or elsewhere) preying on rental-car drivers or conducting "the type of exploratory suspicionless searching and dragnet policing" that Byrd predicts. *Id.* To the contrary, in the more than six years since the Third Circuit adopted the majority rule in *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011), courts there have heard only about a dozen cases involving unauthorized-

driver rental-car searches, and none of them was a case in which a driver was stopped or searched solely because he or she was driving a rental car.

Several of the cases involved broader criminal investigations. In *United States v. Gilliam*, No. 2:12-cr-93, 2016 WL 704702, at *1–2 (W.D. Pa. Feb. 23, 2016), for example, a police officer stopped a car at the request of DEA agents who had been "intensive[ly] surveill[ing]" defendants as part of a drug-trafficking investigation and observed them, among other things, loading a box into the car that the agents believed contained "drug proceeds." In *United States v. Butler*, 93 F. Supp. 3d 392, 394–96 (W.D. Pa. 2015), officers involved in a DEA task force stopped a vehicle because, based on their surveillance efforts, they believed the defendant "had heroin in his vehicle." And in *Kennedy*, the Third Circuit's leading case, police officers arrested the defendant in connection with a gun- and drug-dealing scheme, and then subsequently searched a rental car that he was seen driving and that was parked outside his house. 638 F.3d at 161.

Two other stops were based on specific information that drivers were involved in criminal activity. In *United States v. Antoine*, Crim. No. 10-229, 2012 WL 3765173, at *1 (W.D. Pa. Aug. 30, 2012), an officer stopped a van as it was leaving a Walmart parking lot after a Walmart employee called the police to report that two men had tried "to purchase gift cards with credit cards that had been rejected," "that the men had just left the store and entered a white Dodge Caravan minivan with a specific Florida license plate number, and that the minivan was leaving the parking lot." And in *United States v. Norman*, 465 F. App'x 110, 115

(3d Cir. 2012) (unpub.), officers stopped a rental vehicle after "notic[ing] that the license plate number of the rental car was listed on the police 'hot sheet'—a digest of vehicles reported as being stolen within the previous five days"—and "confirm[ing] the car's stolen status" by checking the DMV's database.

One stop simply involved highly suspicious circumstances: Based on narcotics "detectives' observations of two individuals sitting in an SUV that was not running, despite freezing temperatures, in a high crime area, the detectives decided to conduct a mere encounter to investigate and determine what the individuals in the SUV were doing." *United States v. Gardenhire*, Crim. No. 15-87, 2017 WL 1022578, at *2-3 (W.D. Pa. Mar. 16, 2017). It turned out that the car was a rental, but that fact played no role in the officers' decision to approach it. Another idiosyncratic case actually involved a safety check. In *United States v. Woodley*, Crim. No. 13-113, 2015 WL 5136173, at *3 (W.D. Pa. Sept. 1, 2015), an officer "observed a vehicle parked on the berm of [a] highway with its hazard signals activated" and "stopped behind the vehicle to check on the safety of the occupant." The driver provided him an alias, an expired rental agreement that did not list him as an authorized driver, and an insurance card for a vehicle belonging to someone else. *Id.* A representative from the rental company subsequently consented to a search of the car. *Id.*

That leaves the cases involving traffic stops. Byrd contends the Third Circuit's rule encourages police officers to stop rental cars for "technical" traffic violations as pretexts for exploratory searches, and notes that officers in this case stopped him for a traffic

violation after identifying the car he was driving as a rental. Pet. Br. 38–39. The *amici* States identified one similar case in the Third Circuit. *See United States v. Frierson*, 611 F. App'x 82, 84–85 (3d Cir. 2015) (unpub.). But in every other unauthorized-driver case in the Third Circuit involving searches of rental cars stopped for traffic violations, the officers apparently learned the cars were rentals *after* they had stopped them.

These cases follow a similar pattern. In one such case, a state trooper stopped a car because "he saw that [it] had an electronic GPS device mounted on the car's windshield," which was a violation of state law, but the trooper only later learned that the car was a rental. *United States v. Goode*, Crim. Nos. 11-204-1, 11-204-2, 11-204-3, 2011 WL 6302553, at *1–2 (E.D. Pa. 2011), *aff'd sub nom United States v. Mebrtatu*, 543 F. App'x 137, 139–40 (3d Cir. 2013). In another, an officer initiated a traffic stop because he "observed a white van allegedly traveling without its headlights or taillights activated." *United States v. Greene*, No. 15-CR-15, 2017 WL 2180354, at *1 (M.D. Pa. May 18, 2017). He learned it was a rental only when he "asked the driver . . . for her driver's license, vehicle registration, and proof of insurance" and she instead handed him "a New York state benefits car and a Hertz rental car agreement." *Id.* *See also United States v. Roberts*, No. 2:13-CR-0502, 2016 WL 347311, at *1 (D.N.J. Jan. 28, 2016) (officer pulled over a vehicle with expired registration stickers and subsequently learned from the driver that it was a rental); *United States v. Kennedy*, Crim. No. 13-240, 2014 WL 6090409, at *2 (W.D. Pa. Nov. 13, 2014) (officer stopped vehicle for speeding and learned it was a rental vehicle only after

pulling it over); *United States v. Akinola*, Crim. No. 11-310, 2013 WL 1103702, at *1–2 (D.N.J. Mar. 15, 2013) (officers stopped a car "after having observed it braking abruptly and swerving between lanes" and therefore believing the driver was "driving under the influence of alcohol"; "[a]t some point after the stop, the officers learned" that the car was a rental and was rented to the driver's girlfriend).

Indeed, even in the cases not involving traffic violations, officers usually learned that cars were rentals only *after* they stopped them. *Gardenhire*, 2017 WL 1022578, at *2–3; *Woodley*, 2015 WL 5136173, at *3; *Butler*, 93 F. Supp. 3d 394–96; *Antoine*, 2012 WL 3765173, at *2.

And none of the other circuits' leading cases suggest that suspicionless stops and searches of rental cars are widespread, regardless of whether the courts apply the majority rule or Byrd's permission-based exception. *See United States v. Wellons*, 32 F.3d 117, 118 (4th Cir. 1994) (state trooper stopped defendant for speeding and only learned it was a rental car when he asked for license and registration); *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990) (border patrol agent stopped defendant Boruff after the agent (1) "observed Boruff and Taylor traveling at the same speed, in the same two vehicles, at approximately the same distance apart, on two consecutive days on the same stretch of highway near the Mexican border," (2) "knew that Boruff had put something up to his mouth as if it were a microphone when the Border Patrol vehicle passed, that the rental car had a CB radio antenna on the roof," and (3) "[m]ost importantly," "had discovered . . . 591 pounds of marijuana in [Taylor's] pickup truck");

United States v. Obregon, 748 F.2d 1371, 1373 (10th Cir. 1984) (defendant stopped at a roadblock that "had been established to conduct routine driver's license and car registration checks, and to afford training to two members of the New Mexico Mounted Patrol"; officer prolonged the stop "[u]pon determining that Obregon was driving a rented car with expired plates" because he suspected that the car might be stolen); *see also United States v. Sanchez*, 943 F.2d 110, 111–12 (1st Cir. 1991) (defendant was stopped for speeding); *United States v. Lyle*, 856 F.3d 191, 196 (2d Cir. 2017) (officers approached defendant's car based on assorted behavior and only then learned that it was a rental); *United States v. Smith*, 263 F.3d 571, 575 (6th Cir. 2001) (officer followed a vehicle he believed was speeding and then stopped the vehicle after "observing [it] cross onto the shoulder of the road twice within approximately 200 yards").

Cases in the circuits that have adopted Byrd's proposed rule likewise did not involve officers' indiscriminately targeting rental cars. *See United States v. Muhammad*, 58 F.3d 353, 354 (8th Cir. 1995) (officers stopped defendant "in connection with a drug investigation"); *United States v. Thomas*, 447 F.3d 1191, 1994–95 (9th Cir. 2006) (acting on a corroborated tip that defendant had previously rented cars or instructed others to do so in order to transport cocaine, DEA officers tracked and then stopped a rental car rented by one of defendant's known associates).

In short, there is no evidence from the Third Circuit (or anywhere else) that the majority rule—that a driver has no expectation of privacy in a rental car for which he is not covered by the rental agreement—encourages

police to engage in the kind of abuses that Byrd predicts.

III. The Majority Rule Is Easier to Administer Than the One Byrd Proposes

The majority rule is also far easier to administer than the alternative rule Byrd suggests: "that a person has a reasonable expectation of privacy in a vehicle, if she has possession and control over it with the renter's permission." Pet. Br. 43. Byrd contends the majority rule "is impractical to apply," and that "[u]nlike the Third Circuit's authorized-driver test, the considerations relevant to possession and control will tend to be readily apparent to an officer at the scene." *Id.* at 17, 43.

Byrd is wrong as a matter of common sense. Whether someone is listed as an authorized driver generally will be clear on the face of the rental agreement and will not require an officer to parse all of its terms and conditions, as Byrd suggests. Pet. Br. 40–42. Either drivers are listed as authorized drivers or they are not.

In contrast, officers often will be hard pressed to determine during a brief, roadside traffic stop whether a driver actually has the renter's permission to drive a rental car, particularly where (as here) the renter herself is not present. Doing so will require officers either to assess the driver's credibility (Is he telling the truth about having permission? Was the renter's permission conditional on following the law?) or to track down the renter and then assess her credibility (If she says she did not give the renter permission, is she telling the truth?). That process is a recipe for

prolonged stops and equally prolonged litigation. The *Amici* States have seen enough Fourth Amendment litigation to know that Byrd's claim to administrative ease is disingenuous at best.

And, again, experience in the majority of circuits that have decided the issue consistently with the Third Circuit below reveals no practical difficulty with examining a rental agreement.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* FOR PROFESSOR MORGAN A. CLOUD IN SUPPORT OF THE PETITIONER

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ARGUMENT 4

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A. When there is a physical intrusion into a person's personal property, this Court first considers an individual's rights from a property-based perspective. 4

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Charles Howard Candler Professor of Law at Emory University School of Law, where he specializes in the fields of criminal law, constitutional criminal procedure, comparative constitutional law, white collar crime, and digital privacy. Amicus teaches a course on constitutional criminal procedure that covers Fourth Amendment searches and seizures, and has written numerous scholarly publications on Fourth Amendment history, theory, and doctrine. Amicus has no interest in the outcome of this case, but has an interest in seeing that Fourth Amendment search and seizure law and the law of standing develop in ways consistent with the history and meaning of the Fourth Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amicus curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

In *Jones v. United States*, 565 U.S. 400 (2012) and *Florida v. Jardines*, 569 U.S. 1 (2013), this Court held that when the government physically intrudes into a constitutionally protected area to obtain information, it relies upon a property-based rationale to determine whether a "search" occurred. These decisions recognized that property and reasonable expectation of privacy theories serve completementary functions in Fourth Amendment jurisprudence.

Fourth Amendment standing traditionally was linked to property rights, but in recent years property has been supplanted by a reasonable-expectation-of-privacy model intended to determine whether a person's substantive Fourth Amendment rights were violated. Nonetheless, this Court has frequently turned to property to help it determine whether a reasonable expectation of privacy was violated.

Applying traditional property law rules, Mr. Byrd was a bailee who has standing to challenge the search of the automobile. Under traditional bailment principles, he became a bailee when Ms. Reed gave him possession and control of the automobile she rented.

Mr. Byrd also has "standing" under the reasonable-expectation-of-privacy test. Among the factors this Court has considered in making that determination are whether the person had dominion and control over the property, whether he had the right to exclude others, and whether he had property

related interests like ownership or possession. Using those criteria, Mr. Byrd has Fourth Amendment "standing."

ARGUMENT

I. THIS COURT EMPLOYS BOTH PROPERTY AND PRIVACY PRINCIPLES TO INTERPRET THE FOURTH AMENDMENT.

A. When there is a physical intrusion into a person's personal property, this Court first considers an individual's rights from a property-based perspective.

This Court has confirmed that when the government physically intrudes upon personal property to obtain information, it first looks to a property-based rationale to determine whether there was a "search" within the meaning of the Fourth Amendment. *See* U.S. CONST. amend. IV; *see also United States v. Jones*, 565 U.S. 400, 405–408 (2012).

"[U]ntil the latter half of the 20th century," this Court based much of its Fourth Amendment jurisprudence on property law concepts. *Id.* at 405 (citing *Kyllo v. United* States, 533 U.S. 27, 31 (2001). Property concepts defined when a search or seizure occurred, *id.*, and only someone with a property-based interest could contest the search or seizure of property. *See Jones v. United States*, 362 U.S. 257, 257–267 (1960).

Employing property-based theories to define Fourth Amendment rights is consistent with the Amendment's text, which "reflects its close connection to property" otherwise the phrase 'in their persons, houses, papers, and effects'" would have been superfluous." *Id.* at 405.

During the latter decades of the twentieth century, this Court began employing theories not dependent upon traditional property law concepts to resolve Fourth Amendment disputes. *See, e.g., Jones*, 362 U.S. at 257–267 (discussing standing); *Silverman v. United States*, 365 U.S. 505, 513 (1961) (seizure of intangible conversations); *Warden v. Hayden*, 387 U.S. 294, 325 (1967) (overruling the mere evidence rule).

In *Katz v. United States*, 389 U.S. 347 (1967), this Court overruled the property-based "trespass doctrine" announced in *Olmstead v. United States*, 277 U.S. 438, 466 (1928). *Katz* held that a search occurred when federal law enforcers used an electronic eavesdropping device to listen to conversations made from a public telephone booth, even in the absence of a physical trespass into a constitutionally protected area. *Katz*, 389 U.S. at 350–353. In subsequent cases, this Court developed a two-part test derived from Justice Harlan's concurring opinion in *Katz* to resolve numerous Fourth Amendment questions by determining whether government actions violated a person's "reasonable expectation of privacy." *See id.* at 360 (Harlan, Justice, concurring); *see also Jones*, 565 U.S. at 406.

In the decades following the *Katz* decision, this Court has employed the reasonable-expectation-of-privacy test so frequently, and in so many different settings, that many have concluded that the reasonable-expectation-of-privacy test replaced property as the exclusive tool for deciding Fourth Amendment questions. *See, e.g., Jones*, 565 U.S. at 419 (this Court should "analyze the question

presented in this case by asking whether respondent's reasonable expectations of privacy were violated") (Alito, J., concurring); *Florida v. Riley*, 488 U.S. 445, 467 (1989) (a majority of the Justices agree that determining whether appellee was subjected to a search depends upon whether he "had a reasonable expectation of privacy") (Blackmun, J., dissenting); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Oliver v. United States*, 466 U.S. 170, 173 (1984) ("[T]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy'").

This interpretive theory is consistent with language contained in the *Katz* opinion. For example, *Katz* declared that the "Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. The sheer number of opinions employing the expectations test while eschewing property-based theories also suggested that this interpretation of *Katz* was correct. It was not.

B. Privacy and property serve complementary functions in Fourth Amendment jurisprudence.

Recently, this Court has emphasized that an individual's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones*, 565 U.S. at 406; *see also Florida v. Jardines*, 569 U.S. 1, 11 (2013) (explaining that the reasonable-expectation-of-privacy test is not the only mode of determining whether a Fourth Amendment violation occurred). Rather than replace property in Fourth Amendment jurisprudence, *Katz's* reasonable-expectation-of-privacy test "has been *added to*, not *substituted for*,

the common-law trespassory test." *Id.* at 409; *see also id.* at 414 (Sotomayor, J. concurring); *see also Jardines*, 569 U.S. at 12–16 (Kagan, J., concurring).

Neither privacy nor property is the exclusive test for resolving Fourth Amendment disputes. The two theories *complement* one another. Government actions involving no physical intrusion "remain subject to *Katz* analysis," *Jones*, 565 U.S. at 415 (Sotomayor, J. concurring), while actions involving a physical intrusion are subject to the common-law trespass test. *Id.*

Property-based rules establish "a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'" *Jardines*, 569 U.S. at 5.

While *Katz* adds to that Fourth Amendment baseline, it does not subtract anything from the Amendment's protections. It simply recognized that property rights "are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County*, 506 U.S. 56, 64 (1992); *see also Jones*, 565 U.S. at 414 (Sotomayor, J. concurring) ("*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.").

C. Recognizing that property and privacy are complementary theories is consistent with Katz.

A careful reading of the *Katz* opinion reveals that this Court adopted neither property nor privacy as the exclusive theory for interpreting the Fourth Amendment. Instead, *Katz* recognized that each approach was useful in some contexts, but inapplicable in others.

The *Katz* majority concluded that "the correct solution of Fourth Amendment problems *is not necessarily promoted* by incantation of the phrase 'constitutionally protected area.'" *Katz*, 389 U.S. at 350 (emphasis added). This is not a blanket rejection of property. It offers the unremarkable insight that property provides the solution of some, but not all, Fourth Amendment problems.

Katz also rejected the idea that privacy did, or could, serve as the exclusive interpretive theory: "[T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." *Id.* at 351. Rather, the Fourth Amendment only "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Id.* at 350.

These passages from *Katz* demonstrate that even at the birth of the reasonable-expectation-of-privacy doctrine, this Court recognized that property and privacy existed together as tools for solving different Fourth Amendment problems.

Viewed from this perspective, it is apparent that many of this Court's post-*Katz* decisions also were consistent with the dual property-privacy interpretive theory.

For example, some prominent post-*Katz* decisions applied the reasonable-expectation-of-privacy test in cases where government actors used technological devices to conduct surveillance without physically trespassing upon private property. *See, e.g., Riley*, 488 U.S. at 447–448 (observation of a home's curtilage from a helicopter flying at a legal altitude); *Ciraolo*, 476 U.S. at 207, 209 (1986) (observation of home's curtilage from an airplane flying in navigable airspace); *Dow Chemical v. United States*, 476 U.S. 227, 229 (1986) (photographs of a private industrial facility taken from an airplane).

Other decisions found that government agents' physical intrusions upon private property did not violate a person's reasonable expectation of privacy because the intrusions did not violate property interests protected by the Fourth Amendment. *See, e.g., California v. Greenwood*, 486 U.S. 35, 43 (1988) (search of garbage "abandoned" for collection did not violate a reasonable expectation of privacy); *Oliver*, 466 U.S. at 178 (trespass in open fields not a Fourth Amendment search); *Dunn v. United States*, 284 U.S. 390, 407 (1932) (trespass in open fields not a Fourth Amendment search).

Conversely, some post-*Katz* opinions relied upon property theory to decide Fourth Amendment questions. *See, e.g., Jardines*, 569 U.S. at 11–12 (bringing trained drug detecting dog within a home's

curtilage to search for drugs within the home was a trespass violating Fourth Amendment property rights); *Jones*, 565 U.S. at 400–413 (physical trespass on private vehicle to install GPS tracking device violated Fourth Amendment); *Soldal*, 506 U.S. at 61 (seizure of mobile home violated Fourth Amendment property rights).

Finally, in a number of cases this Court turned to property law to determine decide whether any reasonable expectation of privacy existed or was violated. *See, e.g., Oliver*, 466 U.S. at 180 (the common law "open fields" rule was consistent with a finding that no reasonable expectation of privacy was violated by a government search in open fields); *Dunn*, 284 U.S. at 390–407; *Riley*, 488 U.S. at 447–448 (surveillance of a home's curtilage did not violate reasonable expectation of privacy, but Fourth Amendment violation might have occurred if helicopter had flown close enough to the ground to physically interfere with use of private property).

The continued vitality of both property and privacy concepts in Fourth Amendment jurisprudence helps explain why a bailee of private property, like Mr. Byrd, has a right to challenge the search and seizure of bailed property.

II. BOTH PROPERTY AND PRIVACY CAN BE USED TO RESOLVE FOURTH AMENDMENT STANDING QUESTIONS.

Property and privacy analyses are relevant for determining whether a person has Fourth Amendment standing to challenge government searches and seizures. Once again, property and

privacy provide complementary theories, and this dual-theory approach is consistent with this Court's Fourth Amendment standing decisions.[2]

The claim that property remains part of Fourth Amendment standing jurisprudence might appear to contradict some of this Court's decisions, particularly *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). But even *Rakas* explains why, in light of this Court's recent decisions in *Jones* and *Jardines*, property concepts remain central to Fourth Amendment standing jurisprudence.

Fourth Amendment standing analysis traditionally raised multiple questions: (1) was there a search or seizure, (2) was the search or seizure unreasonable under the Fourth Amendment, and (3) was the defendant a person aggrieved because the government actions intruded upon his personal rights?[3] *See, e.g., Rakas*, 439 U.S. at 133–134; *Alderman v. United States*, 394 U.S. 165, 174 (1969); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Wong Sun v. United States*, 371 U.S. 471, 504 (1963).

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[2] Because the parties are virtually certain to address reasonable expectation of privacy questions in great detail, this brief focuses instead on property related issues likely to receive less attention in those papers. *See* Br. for Pet'r. at 17–26.

[3] In *Rakas*, this Court phrased the issues differently. It wrote that "as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." *Rakas*, 439 U.S. at 139.

Rakas concluded that separate inquiries about standing and substantive rights violations were unnecessary because the "type of standing requirement discussed in *Jones* and reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine." *Rakas*, 439 U.S. at 139. After *Rakas*, the inquiry focused on determining whether a person's Fourth Amendment rights were violated by an unreasonable search or seizure.

Subsequent decisions by this Court have followed suit: "After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner." *See Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980). These decisions seemed to assume that privacy was the sole measure of a person's substantive Fourth Amendment rights.

This Court's recent decisions confirm that this assumption is incorrect. In some cases, expectation of privacy analysis is the appropriate analytical tool. But in cases where a physical intrusion occurs, this Court first considers an individual's property rights. *See Jones*, 565 U.S. at 415 (Sotomayor, J. concurring).

In the present case, for example, where government actors conducted a physical search and seizure of personal property, this Court should look first to property law to determine whether the Appellant's substantive Fourth Amendment rights were violated.

Even after *Rakas*, making that determination may require analysis of issues traditionally classified as standing questions, and finding the answer

difficult. "We are under no illusion that by dispensing with the rubric of standing used in *Jones* we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure." *Rakas*, 439 U.S. at 140. Surprisingly, property rights can play a role in standing analyses based upon the expectation-of-privacy theory.

A. Fourth Amendment standing traditionally was tied to property rights.

Historically, Fourth Amendment standing was tied to property rights. Pre-*Rakas* cases either explicitly or implicitly looked to property rights to determine whether a defendant had Fourth Amendment standing.

For instance, in *Jeffers v. United States*, 342 U.S. 48 (1951), the Court found an individual who claimed ownership of contraband had standing to challenge an unlawful search and exclude the illegal fruits flowing it. *See Jeffers*, 342 U.S. 48, 54 (1951); *see also Jeffers v. United States*, 187 F.2d. 498 (1950). That was because an individual "who claims ownership *in* or *right to possession of* the premises searched or property seized" has standing to challenge an unlawful search or seizure. *Jeffers*, 187 F.2d. at 501 (emphasis added); *affrm'd by Jeffers*, 342 U.S. 48, 54.

In *Jones v. United States*, 362 U.S. 257 (1960), this Court affirmed that Fourth Amendment standing traditionally had been linked to property rights. A range of property interests, like "*ownership* in or *right to possession* of the premises,

the interest of a lessee or licensee, or of one with dominion," were the bases for standing. *Jones*, 362 U.S. at 266 (quoting *Jeffers*, 187 F.2d. at 501, *affrm'd by Jeffers*, 342 U.S. at 48).

In *Jones*, the area searched did not belong to the defendant, but the resident had allowed Jones to exercise possession, control, and dominion over the apartment to an extent sufficient to create standing. *See Jones*, 362 U.S. at 265–267; *see also Rakas*, 439 U.S. at 141; *Alderman*, 394 U.S. at 176–180 (physical trespass into home by government agents provides homeowner with standing to challenge the seizure of both tangible property and intangible conversations).

This property-based conception of standing tied to the rights of an owner or someone with a possessory interest is consistent with privacy-based understandings. Even after adopting the reasonable-expectation-of-privacy rationale, property rights continued to be factors the Court considered when analyzing Fourth Amendment standing issues.

B. Property rights continue to be important factors for determining whether a person has standing under the reasonable expectation of privacy test.

In *Rakas*, the Court concluded that an individual must possess a "legitimate expectation of privacy in the invaded space" to have standing. *Rakas*, 439 U.S. at 143. But a closer reading of *Rakas* confirms that it recognized that property rights remain essential in determining who has a legitimate expectation of privacy. *See id.* at 147–49.

The Court explained that although it was "focusing on legitimate expectations of privacy," it has not "altogether abandoned use of property concepts in determining the presence or absence of the privacy interest."*Id.* at 143, n. 12. Specifically, the Court provided:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

Id.

This Court applied that property-based process in *Rakas* itself, holding that the defendants had no legitimate expectation of privacy in the vehicle searched because they "asserted neither a *property* nor a *possessory interest* in the automobile, nor an interest in the property seized." *See id.* at 148 (emphasis added).

The Court concluded that the only person who had standing to challenge the search of the automobile was the owner, who also was the driver. His ownership and possession of the vehicle gave him a reasonable expectation of privacy. *See id.* at 129-130.

On the other hand, the petitioners, who were merely passengers in the automobile, did not have a reasonable expectation of privacy because "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Id.* at 148; *see also id.* at 154 (Powell, J. concurring).

While *Rakas* overruled the "legitimately on the premises" standard announced in *Jones*, *id.* at 142-147, it left the underlying property-based analysis in *Jones* untouched. Even under *Rakas'* analysis, *Jones* would have come out the same way, as the cases "involved significantly different factual circumstances." *Id.* at 149. Unlike the defendants in *Rakas*, Jones had "complete dominion and control over the apartment and could exclude others from it," *id.*; therefore, he "*had* a legitimate expectation of privacy." *Id.* at 143 (emphasis added).

This Court has used a property-based analysis to determine whether a person possessed a reasonable expectation of privacy in other cases, as well.

In *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court concluded that a defendant had no reasonable expectation of privacy in his friend's purse. *See Rawlings*, 448 U.S. at 103. Once again, the Court employed indicia of ownership in deciding that Rawlings had no reasonable expectation of privacy.[4] *See id.* at 105. The defendant "never

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[4] Admittedly, the Court deviated from traditional property-based concepts by holding that Rawlings lacked standing to challenge the search that uncovered the contraband drugs,

sought or received *access* to her purse prior to that sudden bailment." *Id.* at 105. Nor did he ever have "the *right to exclude other persons* from access to Cox's [his girlfriend] purse." *Id.* at 105. This was significant because "the *right to exclude* often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest." *Id.* at 112 (emphasis added).

As these cases reveal, analyses based on property and those based on privacy often produce the same outcomes. In these situations, property rules often have a singular advantage. As this Court noted in a recent decision, "[w]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy, under *Katz*. One virtue of the Fourth Amendments property-rights baseline is that it keeps easy cases easy." *Jardines*, 569 U.S. at 11.

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although he claimed ownership of them. *See Rawlings*, 448 U.S. at 105-106.

III. UNDER TRADITIONAL PROPERTY RULES, MR. BYRD IS A BAILEE ENTITLED TO FOURTH AMENDMENT'S FOURTH AMENDMENT STANDING.

A. Traditional bailment principles that are still in place today would have been understood to apply at the time of the Fourth Amendment's drafting.

Bailments are a property law concept far older than the Republic. A bailment is created when there is a delivery of goods from the bailor to another person, the bailee, for a particular use. 2 WILLIAM BLACKSTONE, COMMENTARIES 395. Justice Story also defined it as a "grant of a thing to be used by the grantee gratuitously for a limited time, and then to be specifically returned." JOSEPH STORY, COMMENTARY ON THE LAW OF BAILMENTS 196 (1839); *see also Sparrow v. Airport Parking Co. of Am.*, 289 A.2d 87, 90 (Pa. Super. Ct. 1972); 2 BLACK., COMMEN. 395; *see also* William King Laidlaw, *Principles of Bailment*, 16 CORNELL L. REV. 286, 286–310 (1931).

The bailment relationship grants powers to and imposes duties on the bailee. For example, the bailee "is *entitled to the possession of the property* . . . and therefore *has a special right* or property *in the chattel* to the extent of his bailment contract." *Whitworth v. Jones*, 58 Cal. App. 492, 497 (Cal. Ct. App. 1922) (emphasis added).

Along with the right of possession, the bailee has the right to sue for damages when someone damages the property or interferes with the bailee's

possessory interest. *See, e.g., Lear Inc. v. Eddy*, 749 A.2d 971, 974 (Pa. Super. Ct. 2000); *see also Whitworth*, 58 Cal. App. at 492, 497. On the other hand, the bailment also makes the bailee liable for damage done to the owner's chattel while he has possession of it, if his negligence or unauthorized use caused the damage. *See Todd v. Figley*, 1838 Pa. LEXIS 143, at **4–6 (Pa. 1838); *see also Sanft v. Haisfield Ford, Inc.*, 178 A.2d 791, 792 (N.Y. 1962); *Lear Inc.*, 749 A.2d at 971, 974.

Common law cases elucidated these principles long before our independence, and courts continued to apply them in the early republic. For example, over 400 years ago a bailee was held liable for his servant's theft of the goods entrusted to him. *See Southcote's* case, (1601) 4 Co. Rep. 83b, 84a.

It "was well settled" that a bailment existed when someone charges another with keeping "money or any other article" safe, *Mott v. Pettit*, 1 N.J.L. 344 Sup. Ct. LEXIS 27, at **11 (N.J. 1795), and the bailee who accepted that responsibility was responsible for preserving the property even if he received no payment for his services. A bailment was created "when there is a delivery of goods or chattels to somebody who is to carry them, or do something about *gratis*, without any reward for such his work or carriage." *See Coggs v. Bernard*, (1703) 2 Ld. Raym. 909, 913–920 (also listing six forms of bailment). These rules continued to be enforced throughout the nineteenth century. *See, e.g., Hicock v. Buck*, 22 Vt. 149, 151 (Vt. 1850); *First Nat'l Bank v. Ocean Nat'l Bank*, 60 N.Y. 278, 284–285 (N.Y. 1875).

A contract is often used to create the bailment relationship, but it is not essential. "It is the element of lawful possession and the duty to account for the thing as property of another that creates bailment, regardless of whether such possession is based upon contract." *Foulke v. New York Consolidated R.R.*, 228 N.Y. 269, 275 (1920); *see also State v. Carr*, 118 N.J.L. 233, 234 (N.J. 1937); STORY, COMMENTARY ON THE LAW OF BAILMENTS 156; Laidlaw, *Principles of Bailment*, 16 CORNELL L. REV. at 286–310.

These traditional bailment rules are relevant to this litigation because Mr. Byrd was a bailee given possession of the automobile by Ms. Reed.

B. Byrd became a bailee once he had possession and exercised control over the rental automobile.

It is undisputed that Ms. Reed had lawful possession of the rented automobile and that she voluntarily transferred possession to Mr. Byrd, who accepted control over the vehicle with the intent to return it. *See* Pet. for Cert. at 5–9. He had exclusive control over the car keys, and the police conceded he had "complete control of his car." *See id.* Moreover, Byrd was also the only person using the vehicle for approximately eight hours (10:30 a.m. to 6:30 p.m.). *See id.*

This scenario describes a classic bailment relationship, not dissimilar from the relationship this Court identified in its recent decision in *Jones*. There, this Court concluded that although Jones "was not the owner," he was the "exclusive driver" of

the vehicle and "had at least the property rights of a bailee." *Jones*, 565 U.S. 400, at n. 2.

Jones was a bailee of the vehicle tracked by GPS technology because his wife, the registered owner, granted him possession of the vehicle for his "exclusive use." *Id.* at 425. As someone with a possessory interest in the vehicle, he had standing under traditional Fourth Amendment rules. *See, e.g., Jeffers*, 342 U.S. at 48–54; *Jones*, 362 U.S. at 257–273. As a bailee with possession of the vehicle rented by his fiancé, Ms. Reed, Mr. Byrd also should have standing under Fourth Amendment property jurisprudence.

C. Mr. Byrd also has standing under the reasonable-expectation-of-privacy test.

When this Court has used the reasonable-expectation-of-privacy test to determine who has Fourth Amendment "standing" to challenge an automobile search, it has emphasized the importance of possession or control of the vehicle, including control over the keys, and the right to exclude others from entering the vehicle. *See Rakas*, 439 U.S. at 155, n. 2.

This Court similarly focused on issues of control and the right to exclude others from having access to the property in *Rawlings*. There, the defendant had no control over the bag searched by the police, nor did he have the "*right to exclude other persons*" from it. *Rawlings*, 448 U.S. at 105. Therefore, like the passengers in *Rakas*, he had no reasonable expectation of privacy in the property that was searched.

In contrast, when Mr. Byrd was stopped by the police, it is undisputed that he had possession and control of the automobile, including the right to exclude people from it. *See* Pet. for Cert. at 5–9. Applying the factors employed by this Court in cases like *Rakas* and *Rawlings*, Mr. Byrd, as bailee, had a reasonable expectation of privacy in the vehicle he was driving when stopped by the state trooper. *See id.* Under a property-based analysis, and under a reasonable-expectation-of-privacy analysis, Mr. Byrd is a person aggrieved by the search and is entitled to challenge its constitutionality.

CONCLUSION

In light of the foregoing, *amicus* respectfully urges this Court to reverse the U.S. Court of Appeals for the Third Circuit's opinion and find that Mr. Byrd may challenge the constitutionality of the search of the rental car he was driving.

Respectfully Submitted,

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No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND TWENTY-THREE TECHNICAL EXPERTS AND LEGAL SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC routinely participates as *amicus curiae* before this Court and other courts in cases concerning privacy issues, new technologies, and constitutional interests. *See, e.g.*, *Carpenter v. United States*, No. 16-402 (2017) (arguing that the Fourth Amendment protects the right against warrantless seizure and search of location data); *State v. Earls*, 214 N.J. 564 (2013) (same); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (arguing that the First Amendment protects the right to access speech from the privacy of a personal electronic device); *Utah v. Streiff*, 136 S. Ct. 2056 (2016) (arguing that evidence obtained via suspicionless identification should be suppressed); *Riley v. California*, 134 S. Ct. 2473 (2014) (arguing that it is unreasonable to warrantlessly search a cell phone incident to an arrest); *Florida v. Harris*, 133 S. Ct. 1050 (2013) (arguing that the government bears the burden of establishing the reliability of new investigative techniques used in establishing probable cause for a search); *United States v. Jones*, 565 U.S. 400 (2012) (arguing that warrantless tracking of a car using a

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

GPS device violates the Fourth Amendment); *Commonwealth v. Connolly*, 454 Mass. 808 (2009) (same).

EPIC has also filed extensive comments with federal agencies and testified before the U.S. Congress regarding the privacy and consumer safety risks posed by connected vehicles. *See, e.g.*, Comments of EPIC to the National Highway Traffic Safety Administration/Department of Transportation (Nov. 14, 2017);[2] Comments of EPIC to the Federal Trade Commission & National Highway Traffic Safety Administration, EPIC (May 1, 2017);[3] *Self-Driving Vehicle Legislation: Hearing on H.R. 3388 Before the H. Comm. on Energy & Commerce*, 115th Cong. (2017) (statement of Marc Rotenberg, EPIC President);[4] Comments of EPIC to the National Highway Traffic Safety Administration Department of Transportation, EPIC (Nov. 22, 2016);[5] *The Internet of Cars: Joint Hearing Before the Subcomm. on Transp. & Pub. Assets of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (statement of Khaliah Barnes, Associate Director and Administrative Law Counsel, EPIC).[6] EPIC has repeatedly emphasized that there are unique privacy risks arising from modern vehicles that are not addressed in current law. *See* Marc Rotenberg, *Steer Clear of*

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[2] https://epic.org/apa/comments/EPIC-NHTSA-AutomatedDrivingSystems.pdf.

[3] https://epic.org/apa/comments/EPIC-ConnectedCar-Workshop-Comments.pdf.

[4] https://epic.org/testimony/congress/EPIC-HEC-AV-Legislation-Jun2017.pdf.

[5] https://epic.org/apa/comments/EPIC-NHTSA-AV-Policy-comments-11-22-2016.pdf.

[6] https://epic.org/privacy/edrs/EPIC-Connected-Cars-Testimony-Nov-18-2015.pdf.

Cars that Spy, USA Today (Aug. 18, 2011);[7] Marc Rotenberg, *Are Vehicle Black Boxes A Good Idea?*, Costco Connection (April 2013).[8]

EPIC seeks to ensure that Fourth Amendment protections apply to policing practices that implicate new technologies. This case presents a fundamental question about the scope of Fourth Amendment protections as applied to the search of rental vehicles at a time when motor vehicles are being routinely equipped with devices that capture and record personal data. EPIC submits the following *amicus* brief, signed by distinguished technical experts and legal scholars, in support of the Fourth Amendment in the digital age.

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David J. Farber
Distinguished Career Professor of Computer Science and Public Policy, Carnegie Mellon University

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[7] https://usatoday30.usatoday.com/news/opinion/editorials/2011-08-18-car-insurance-monitors-driving-snapshot_n.htm.

[8] http://www.costcoconnection.com/connection/201304?pg=24#pg24.

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SUMMARY OF THE ARGUMENT

The modern vehicle is not your dad's Chevy. The connected car is a computer on wheels. It stores vast troves of personal data, including the date, time, and location of the vehicle, as well as acceleration and braking patterns, weather conditions, and the identities of the occupants. An individual's entire address book can be quickly collected from a Bluetooth-connected device and stored within the vehicle. The car makes little distinction between driver and occupant, those on a rental agreement and those who are not. All of the personal data collected by the vehicle is stored, recorded, and available for later inspection.

In response to these new technologies, many states have established privacy safeguards for modern vehicles. Most have limited police access to the event data recorders, also known as "black boxes." These states are seeking to provide a ride safe from mass surveillance. But the bump in the road remains the absence of a clear Fourth Amendment rule to limit police access to personal data stored in the vehicle. That issue may not be obvious in this case. But if you look under the hood, you will see that the warrantless search of a modern vehicle implicates far more privacy interests than the physical search of a '66 Buick LeSabre.

EPIC also encourages the Court to steer clear of a Fourth Amendment ruling that relies on private contracts. That is a Fourth Amendment detour that leads to a dead end.

ARGUMENT

I. Modern cars collect and store vast troves of personal data.

A warrantless search of a vehicle today could expose much more than just the physical items around the seats. For example, a police officer could readily obtain the complete address book from an occupant's cell phone even though this Court has previously ruled that a similar search of a cell phone incident to arrest would require a warrant. *Riley v. California*, 573 U.S. __ (2014) (holding that the warrantless search of a cell phone seized subsequent to arrest is impermissible); *see also* Lisa Weintraub Schifferle, Fed. Trade Comm'n, *What Is Your Phone Telling Your Rental Car?* (Aug. 30, 2016).[9] It should make no difference whether the search of a vehicle was for a person named on a rental car agreement or not. Modern vehicles spy on both drivers and passengers. Marc Rotenberg, *Steer Clear of Cars that Spy*, USA Today (Aug. 18, 2011).

The automobile is undergoing a transformation. Modern vehicles contain "infotainment" systems that record location data and GPS trips visited while traveling in the rental car, along with a wide range of other personal data. By 2020, approximately 381 million connected vehicles will be on the road, and 90% of cars sold will have the capacity to connect to the Internet. World Economic Forum, *Digital Transformation of Industries Automotive Industry* 9 (2016);[10] Andrew Meola, *Automotive Industry Trends: IoT Connected Smart*

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[9] https://www.consumer.ftc.gov/blog/2016/08/what-your-phone-telling-your-rental-car.

[10] https://www.accenture.com/t20170116T084448__w__/us-en/_acnmedia/Accenture/Conversion-Assets/WEF/PDF/Accenture-Automotive-Industry.pdf.

Cars & Vehicles, Bus. Insider (Dec. 20, 2016).[11] Connected vehicles, which store detailed personal data, will become the predominant form of private transportation in the near future.

A. A search of a modern vehicle can reveal extensive personal data.

Modern cars are computers on wheels. Today's vehicles contain dozens of small computers that are linked together by the car's internal computer network. *See* Allen & Overy, *Autonomous and Connected Vehicles: Navigating the Legal Issues* (2017);[12] Sen. Edward J. Markey (D-Mass), *Tracking & Hacking: Security & Privacy Gaps Put American Drivers at Risk*, (2015) [hereinafter "Markey Report"].[13] These computers control everything from braking, acceleration, steering, engine performance, door locks, and climate control to navigation and entertainment. Allen & Overy, *supra*, at 2. Pre-installed technological systems collect a diverse set of data, including location data recorded at regular intervals; previous destinations entered into the navigation system; and last location parked. Markey Report, *supra*, at 8. These systems also collect operational data, such as vehicle speed; direction/heading of travel; distances and time traveled; average fuel economy/consumption; status of power windows, doors, and locks; tire pressures; fuel level; tachometer reading (engine RPM gauge); odometer

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[11] http://www.businessinsider.com/connected-car-statistics-manufacturers-2015-2.

[12] http://www.allenovery.com/SiteCollectionDocuments/Autonomous-and-connected-vehicles.pdf.

[13] https://www.markey.senate.gov/imo/media/doc/2015-02-06_MarkeyReport-Tracking_Hacking_CarSecurity%202.pdf.

reading; mileage since last oil change; battery health; coolant temperature; engine status; exterior temperature and pressure. *Id.* Modern vehicles also connect "to the Internet and [contain] a variety of sensors, and . . . are thus able to send and receive signals, sense the physical environment around them, and interact with other vehicles or entities." Edward H. Baker et al., *Connected Car Report 2016: Opportunities, Risk, and Turmoil on the Road to Autonomous Vehicles* 10 (Sept. 28, 2016).[14]

Soon, connected vehicles will collect data about "driving patterns, touch point preferences, digital service usage, and vehicle condition." *Id.* at 21. As cars become increasingly connected, they will collect and store more and more sensitive data about the driver and other occupants of the vehicle. According to a 2015 Senate report, about a third of all cars from 13 major car manufacturers collect data about driving history. Markey Report, *supra*, at 8. This includes "navigation, telematics, infotainment, emergency assist, stolen vehicle recovery, and event data recording systems." *Id.* This data would reveal where a car was driven and how the car was driven, and could also include the identity of drivers or occupants. *Id.* Telematics systems "use telecommunication networks and GPS signals to allow information, such as location data, to be communicated between a car and a service provider." U.S. Gov. Accountability Office, GAO-14-649T, *Consumers' Location Data: Companies Take Steps to Protect Privacy, but Practices Are Inconsistent, and Risks May Not be Clear to Consumers* (2014).[15]

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[14] http://www.strategyand.pwc.com/media/file/Connected-car-report-2016.pdf.

[15] http://gao.gov/products/GAO-14-649T.

According to a GAO study, the collection and disclosure of consumer location information by in-car navigation providers poses serious risks to consumer privacy. *Id.* at 2. Storing location information over time "create[s] a detailed profile of individual behavior, including habits, preferences, and routes traveled," the exploitation of which can lead to identity theft or threats to personal safety. *Id.*

Rental cars are increasingly equipped with systems that collect personal data about drivers and occupants. Presently, "1 out of 8 cars in Hertz's rental fleet are equipped with dashboard cameras – not outward-facing cameras monitoring the road, but inward-facing cameras capable of making audio and video recordings of everything inside the passenger compartment." Jennifer Abel, Consumer Affairs, *Hertz Putting Passenger-compartment Cameras in Rental Cars* (Mar. 18, 2015).[16] Avis recently announced that it would double the number of connected vehicles in its fleet by 2018, raising the overall number to 100,000. Press Release, Avis Budget Group, *Avis Car Rental Expands Fleet of Connected Cars* (May 22, 2017).[17] Avis specifies that its vehicles are "equipped with devices which allow [Avis] to send commands to and receive certain information from the vehicle, including geolocation data from a global positioning system (GPS). These devices are turned on all the time, even when other services or other media in the vehicle is turned off." Avis,

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[16] https://www.consumeraffairs.com/news/hertz-putting-passenger-compartment-cameras-in-rental-cars-031815.html

[17] *Available at* http://ir.avisbudgetgroup.com/releases.cfm?Year=&ReleasesType=&PageNum=2.

Privacy Notice 3 (2017).[18] Avis further specifies that the devices "collect and process vehicle data about the vehicle itself, such as fuel level, odometer, speed, diagnostic and performance data, tire pressure, accident or damage data, and location and direction of travel data." *Id.* Enterprise rental vehicles also contain telematics systems, which collect (1) location information, (2) crash notification and related crash data, and (3) operational condition, mileage, diagnostic and performance reporting of vehicles. Enterprise, *Global Privacy Policy* (2017).[19] The company claims that it is "not responsible for any data that is left in the vehicle" and that it "cannot guarantee the privacy or confidentiality of such information." *Id.* Rental car companies even "collect photos and videos in some instances, such as when you link your [Avis] account with your social media profile." *See, e.g.*, Avis, *Privacy Notice* 3 (2017).

Rental vehicles also contain "infotainment" systems that collect personal data stored on a driver's cell phone. Schifferle, *supra*. These systems are designed to "pair" an occupant's phone with the vehicle's audio and media system. But once a phone is connected, the car automatically downloads a vast amount of information from the driver's cell phone, including private contacts and messages. *Id.*

The amount of personal data a modern vehicle can collect varies by Bluetooth module "but typically there is storage for hundreds if not thousands of phone numbers." Kelsey Mays, *Do Apple CarPlay, Android Auto Keep Data From Your Smarthphone?* Cars.com

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[18] https://www.avis.com/content/dam/avis/na/us/common/pdf-files/4433_AV_COM_terms_update_01.30.17.pdf.

[19] https://www.enterprise.com/en/privacy-policy.html.

(March 28, 2016).[20] According to technology analyst at HIS Automotive, Colin Bird, advanced Bluetooth systems collect and store data "including keystroke data, wireless sensor reporting and the ability to transmit short data packets like messages, emails, calendar notifications, tasks, notes and reminders." *Id.* Some cars even collect data from the occupants' social media accounts such as Facebook and Twitter. Joe Donovan, *Want to Know If your Phone Pairs with Your Car? This Handy List Should Do the Trick*, Digital Trends (Aug. 5, 2014) (providing a detailed list of automakers and their Bluetooth capabilities).[21] The car also collects call logs and any contacts from the phone. *Id.* This personal data is stored in the vehicle. Schifferle, *supra; see also* Jennifer Abel, Consumer Affairs, *Rental-car Drivers: Take These Important Steps to Protect Our Privacy* (July 13, 2015).[22] Stefan Cross, communications manager for GM's connected-car division warned that someone could easily access the Bluetooth module and get an occupant's phonebook, recent messages and other basic information, such as the name of the phone and Bluetooth key. Mays, *supra*. Furthermore, even if an occupant deletes his phone from the vehicle, only the "pointer" or "map" that shows where the data stored in the system is erased. *Id.* The actual content of the data is embedded memory and remains in the

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[20] https://www.cars.com/articles/do-apple-carplay-android-auto-keep-data-from-your-smartphone-1420684038897/.

[21] https://www.digitaltrends.com/cars/automobile-bluetooth-compatibility/.

[22] https://www.consumeraffairs.com/news/rental-car-drivers-take-these-important-steps-to-protect-your-privacy-071315.html.

system's database. *Id.* A warrantless search of a vehicle would provide access to this sensitive personal data.

Modern vehicles incorporate social media apps, too. For example, "BMW's ConnectedDrive system has Facebook, Twitter and a Wiki Local app (which acts like an in-car travel guide), Mercedes-Benz's 'mbrace' system uses Yelp to help find restaurants and Audi Connect lets drivers not only find parking at their destination, but also reserve and pay for a space." Allen & Overy, *supra*, at 18 (internal citations added). Furthermore, "[t]he Audi Picture Navigation app allows users to use the location metadata embedded in a photo sent from a contact to plot a destination on the car's navigation system." *Id.* Soon to come, the University of Michigan has partnered with Ford, Microsoft and Intel to develop the Caravan Tracker app that enables multiple cars on a trip to connect and share information about how much petrol is left in the fuel tanks, to compare fuel economy, and to share route information. *Id.* All of these apps and personal data collected therefrom are and will become accessible within the vehicle.

Some rental vehicles collect driver and occupant data through the OnStar system, which is owned by General Motors and provides certain navigation and emergency access functions. *See, e.g.*, Avis, *Privacy Notice* 3 (2017); Enterprise, *Global Privacy Policy* (Oct. 9, 2017). OnStar collects a broad range of data to facilitate communications with drivers and occupants, in-vehicle security, hands-free calling, turn-by-turn navigation, and remote diagnostics systems. OnStar, *Home*.[23] This data includes "specific driving behavior,

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[23] https://www.onstar.com/us/en/home.html.

including hard braking events, hard acceleration events, time spent idle, speeds over 80 miles per hour, when a trip occurs and the number of miles driven." OnStar, *Driving Information and Data Collection*.[24] According to OnStar's Privacy Policy, OnStar collects "GPS location, speed, air bad deployments, crash avoidance alerts, impact data, safety system status, braking and swerving/concerning events, event data recorder (EDR) data, seatbelt settings, vehicle direction (heading), camera image and sensor data, voice command information, stability control or anti-lock events, security/theft alerts, infotainment system usage, and WiFi data usage." OnStar, *Privacy Statement*.[25] OnStar acknowledges that this data collection will occur with whomever operates an OnStar equipped vehicle; for example, "you let someone else drive your OnStar equipped vehicle." *Id.* In this case, OnStar's Privacy Statement still applies. *Id.*

Insurance companies have also introduced new techniques that collect data about a driver that could be subject to a law enforcement search. For example, Progressive's Snapshot device plugs into cars' OBDII ports to track a user's driving habits with the incentive that the user will lower his insurance rate. Damon Lavrinc, *Progressive Insurance's Driver Tracking Tool lis Ridiculously Insecure*, Jalopnik (Jan. 20, 2015).[26] Currently, the device has over two million users. *Id.* The Snapshot device logs location data and "collects

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[24] https://www.onstar.com/us/en/help-support/onstar-smart-driver/driving-info-data-collection.html.

[25] https://www.onstar.com/us/en/footer-links/privacy-policy.html.

[26] https://jalopnik.com/progressive-insurances-driver-tracking-tool-is-ridicul-1680720690.

information about how you drive, how much you drive and when you drive. It also collects your vehicle identification number and triggers an email to you if it comes unplugged. Some devices collect location data." Progressive, *Frequently Asked Questions About Snapshot*.[27] Snapshot even collects phone usage data, including phone calls, texting, apps, and so forth. *Id.*

Connected vehicles even collect information about the driver without their knowledge by aggregating and analyzing data. This data could also be obtained in a law enforcement search. For example, some cars have a "drowsiness alert" that triggers based on certain driving data. *Drowsiness Alert*, My Car Does What.[28] The alert detects "drowsy" driving by tracking driving habits, such as lane departure. "High speed alert" gathers information about a vehicle's position, via GPS, with a database of speed limit information to warn a driver if they are speeding. *High Speed Alert*, My Car Does What.[29] Some vehicles even have a camera that can read speed limit signs to determine whether the driver is speeding. *Id.* "Automatic emergency breaking" systems scan the road in front of the vehicle and warn the driver of an impending crash, but can also collect data about whether the driver does not react in time. *Automatic Emergency Breaking*, My Car Does What.[30] The braking technique relies on either

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[27] https://www.progressive.com/auto/discounts/snapshot/snapshot-common-questions/.

[28] https://mycardoeswhat.org/safety-features/drowsiness-alert/.

[29] https://mycardoeswhat.org/safety-features/high-speed-alert/.

[30] https://mycardoeswhat.org/safety-features/automatic-braking/.

camera- or radar-based sensors located in the front of the vehicle to detect proximity between vehicles. *Id.*

Today's vehicles also include built-in event data recorders, otherwise known as "black boxes." *See generally*, EPIC, *Automobile Event Data Recorders (Black Boxes) and Privacy*.[31] Black boxes record the events and actions of the driver, including speed, braking, turning, and use of a safety belt before a collision. Nat'l Highway Traffic Safety Admin., *Event Data Recorder*.[32] Black boxes "may record (1) pre-crash vehicle dynamics and system status, (2) driver inputs, (3) vehicle crash signature, (4) restraint usage/deployment status, and (5) post-crash data such as the activation of an automatic collision notification (CAN) system." *Id.*; *see also* Kim Komando, *Your Car's Hidden 'Black Box' and How to Keep It Private*, USA Today (Dec. 26, 2014).[33] Law enforcement and insurers could seek to use this information to make "determinations about liability and rates based on the data gathered by EDRs." Marc Rotenberg, *Are Vehicle Black Boxes A Good Idea?*, Costco Connection (April 2013); *see also* Marc Rotenberg, *Steer Clear of Cars That Spy*, USA Today (Aug. 18, 2011). In 2013, approximately 96% of all new cars sold in the U.S. contained a black box, and by September 1, 2014, every new vehicle required one. *Id.*

In response to growing privacy concerns related to black boxes, the federal government enacted the Driver Privacy Act of 2015. 18 U.S.C. § 2721, Pub. L.

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[31] https://epic.org/privacy/edrs/.

[32] https://www.nhtsa.gov/research-data/event-data-recorder.

[33] https://www.usatoday.com/story/tech/columnist/komando/2014/12/26/keep-your-car-black-box-private/20609035/.

No. 114-94, 129 Stat. 1712 (2015); *see also* Nat'l Conference of State Legislatures, *Privacy of Data from Event Data Records: State Statutes* (Jan. 4, 2016).[34] The Act placed limits on access to black box data and guaranteed that the information collected belongs to the owner or lessee of the vehicle. 18 U.S.C. § 2721.

The states have also passed laws to give individuals control over the personal data gathered in modern vehicles. Seventeen states have enacted statutes governing black boxes and privacy: Arkansas, California, Colorado, Connecticut, Delaware, Maine, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Texas, Utah, Virginia and Washington. Nat'l Conference of State Legislatures, *Supra*; *see* EPIC, *State Auto Black Boxes Policy*.[35] For example, in California, except for safety research or for auto diagnostics, one must obtain a court order and the owner's consent to download the data. *Id.* Arkansas, North Dakota and Oregon laws prohibit requiring owners to disclose their data as a condition of an insurance payment or settlement. *Id.* Furthermore, more than a dozen states require written notice to owners of the use of event data recorders. *Id.*

As newer technologies and recent legal developments make clear, modern vehicles raise many far-reaching privacy concerns that a Fourth Amendment analysis cannot ignore. Moreover, none of the techniques currently used in modern vehicles to collect personal data draw a distinction between those who are on a rental agreement and those who are not. The Third Circuit's bright-line distinction between these

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[34] http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx.

[35] https://epic.org/state-policy/edr/.

two categories of drivers is entirely disconnected from the scope of personal data that could be obtained from the vehicle.

Even the contractual relationship affords little protection. A rental agreement runs for a specific duration, but the data storage may extend well beyond that period. Once a rental vehicle has been returned to its dispatcher and the agreement has expired, the Third Circuit's holding establishes that the driver is no longer subject to the agreement; therefore, the driver would not have Fourth Amendment protection against the subsequent warrantless search of the data stored in the vehicles. Subsequent rentals users, employees, hackers, and even law enforcement officials could access information collected and stored through connecting personal devices in the vehicle. Schifferle, *supra*. Consequently, the Third Circuit's bright-line rule would significantly expand the scope of warrantless searches of driver data.

II. Relying on rental contracts to negate Fourth Amendment standing would undermine legitimate expectations of privacy.

This Court has held that the Fourth Amendment limits the ability of the government to track the location of a vehicle without regard to whether the driver is the owner of the vehicle or named on a rental car agreement. *United States v.* Jones, 565 U.S. 400 (2012). In *Jones*, the Fourth Amendment analysis did not turn on the status of the driver but on the conduct of the police. In three different opinions, the Court found that the warrantless tracking of the vehicle by

means of new technology violated the Fourth Amendment. Whether the driver was the owner or the renter was irrelevant.

A. The status of the driver is irrelevant to Fourth Amendment privacy interests.

This Court made clear in *United States v. Jones* that significant privacy interests are implicated by the tracking and collection of data from automobiles. While the Court disagreed over whether a property-based interest or the reasonable expectation of privacy analysis was the best route to take, the Justices ended up at the same destination and unanimously agreed that the warrantless search of a vehicle equipped with tracking technology violated the Fourth Amendment.

Justice Scalia emphasized in his opinion for the Court that where police conduct violates property-based interests, it triggers the Fourth Amendment:

> [T]he Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search." It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted . . . . The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and

> seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous . . . . Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing . . . . By attaching the device to the Jeep, officers encroached on a protected area.

Jones, 565 U.S. at 404, 405, 410. Justice Scalia's opinion did not turn on the status of the driver, even though the vehicle was not registered to the defendant. Instead, Justice Scalia emphasized that the "government physically occupied private property for the purpose of obtaining information." *Id.* at 404. The occupation of this private property constituted a search under the Fourth Amendment, regardless of to whom the vehicle belonged. *Id.* at 405. Therefore, under the property-based view, the status of the driver did not dictate the scope of Fourth Amendment protection.

In his concurring opinion in *Jones*, joined by four others, Justice Alito reasoned that the police tracking of the vehicle triggers the Fourth Amendment under the reasonable expectation of privacy test, established in *Katz v. United States*, 389 U.S. 347, 351 (1967):

> [T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of

> an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark.

Jones, 565 U.S. 430. Justice Alito's analysis also did not depend on the status of the driver. Instead, Justice Alito focused on the *use* of the GPS for long-term tracking. *Id.* at 424. Long-term monitoring can occur even when the government has not committed a technical trespass (e.g. manufacturers including a GPS tracking device in every car). *Id.* A driver still maintains a reasonable expectation of privacy in the data collected from long-term tracking, regardless of if this data is retrieved through a GPS device already installed in the vehicle or placed by the government. *Id.* Despite a lack of ownership of the vehicle, Justice Alito found that a defendant had a reasonable expectation of privacy in the long-term monitoring of his driving habits. Most importantly, the status of the driver was not determinative in Justice Alito's reasonable expectation of privacy analysis.

In a separate concurring opinion in *Jones*, Justice Sotomayor set out a hybrid analysis that suggested that the case be resolved under both the property test and the reasonable expectation of privacy test:

> [A]s Justice Alito notes, physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity,

> the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factor- or owner-installed vehicle tracking devices or GPS-enabled smartphones. In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." *Ante*, at 953. As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. *Post*, at 962-963. Under that rubric, I agree with Justice Alito that, at the very least "long term GPS monitoring in investigations of most offenses impinges on expectations of privacy."

Jones, 565 U.S. at 414–15 (internal citations omitted). Justice Sotomayor's analysis similarly did not turn on the status of the driver. She recognized that the Fourth Amendment is concerned not only with trespassory intrusions on property, but also when the government's conduct violates a subjective expectation of privacy. *Id.* Unlike Justice Alito, Justice Sotomayor found that even aspects of short-term surveillance could violate a reasonable expectation of privacy. *Id.* at 415. The analysis should focus on "whether people

reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on," not whether one can claim ownership over an object or space. *Id.* In fact, Justice Sotomayor pointed to precisely the problem presented in the search of the modern vehicle (the proliferation of data collection):

> It may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.

Id. (emphasis added). Furthermore, Justice Sotomayor emphasized that she would "not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." *Id.* In other words, the Court should steer clear of an analysis that relies on the status of the driver and follow the right sign marked "information involuntarily disclosed to others" to ascertain whether there is a reasonable expectation of privacy in the modern vehicle.

As the various opinions in *Jones* make clear, regardless of the Fourth Amendment road followed, the status of the driver, named on the rental agreement or not, is simply a detour and has no bearing on the Fourth Amendment outcome.

B. Constitutional rights are still recognized despite contractual violations.

The courts have recognized that the scope of the Fourth Amendment should not be dictated by "[s]ubtle distinctions" of state consumer protection laws or contracts. *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (citing *Jones v. United States*, 362 U.S. 257, 266 (1960) and *Katz v. United States*, 389 U.S. 347 (1967)). Courts should not rely on whether a person's name appears on a consumer contract to determine whether they have a constitutionally protected privacy interest as against the government. This is true not only of rental agreements, but also all commercial services governed by contracts, including, for example, the use of cell phones. *See, e.g., United States v. Powell*, 732 F.3d 361, 374 (5th Cir. 2013) (holding that a defendant disclaiming a personal connection to the phone discovered in the vehicle lacked a legitimate expectation of privacy in the phone being searched, regardless of who the phone actually belonged to). Furthermore, the Court has found that "arcane distinctions developed in property and tort law . . . ought not . . . control" the reasonableness of an expectation of privacy. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

Yet the bright-line rule offered in this case would carry forward a distinction without constitutional significance and would fail to recognize the privacy interests of all driver and other occupants subject to a warrantless search.

* * *

The use of data generated by a rental vehicle is not a new privacy problem. David Burnham, *The Rise of The Computer State* 39–40 (1980) (describing police access to the "Wizard of Avis" to track the location of those who rent cars). But the routine collection of detailed personal data in modern vehicles is new and will become more acute in the years ahead.

Before the Court heads down the road of warrantless car searches in the modern vehicle, we write to warn that there is a caution sign ahead: "this will permit police access to the same data that the Court held in *Jones* would require a warrant." A better route is the one marked "Fourth Amendment warrant requirement."

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to reverse the decision of the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Terrence Byrd,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of *Amici Curiae* Fourth Amendment Scholars in Support of Petitioner

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QUESTION PRESENTED

Whether a driver has a reasonable expectation of privacy in a rental car when the driver has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

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INTRODUCTION

The *amici curiae* submit this Brief in support of Petitioner, and urge the Court to reverse the opinion of the United States Court of Appeals for the Third Circuit.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are criminal procedure professors who teach, study, and write about the Fourth Amendment. *Amici* believe this case presents fundamental issues concerning how the Fourth Amendment will be interpreted in numerous cases for decades to come. *Amici* are of the view that an unlisted driver[2] who drives a rental car with the permission of the renter has a legitimate expectation of privacy in the rental car.

SUMMARY OF THE ARGUMENT

When an individual rents a rental car, the rental car company gives them permission to *use* the car and permission to *drive* the car. An "authorized

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[1] The parties' counsel have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] This brief uses the term "unlisted driver" to refer to a person who has permission of the renter to use a rental car but is not listed as an "authorized driver" on the rental agreement.

driver" clause precludes the renter from giving an unlisted driver permission to *drive* the rental car but does not preclude the renter from giving an unauthorized driver permission to *use* the car for purposes other than driving. When the renter gives an unlisted driver permission to use the rental car by giving the unlisted driver the key to the car, the unlisted driver has the right to exclude others from the car and, thus, has a legitimate expectation of privacy in it. For example, if a renter drove with an unlisted driver to a job interview and left the unlisted driver with the rental car and its key while being interviewed for a couple of hours, the unlisted driver would have the right to exclude others from the car and a legitimate expectation of privacy in it.

In the case at hand, the renter gave Petitioner permission to use the rental car and permission to drive it. While the "authorized driver" clause precluded the renter from authorizing Petitioner to drive the rental car, that clause had no bearing on, nor did it negate, the authorization given by the renter for Petitioner to use the vehicle. Therefore, by driving the rental car, Petitioner merely engaged in an unauthorized *use* of the rental car, not an unauthorized *taking* of the car. This type of unauthorized use—unauthorized driving—is typically prohibited in the same section of rental agreements that also prohibits renters from engaging in behavior such as using rental cars to commit crimes, to tow or push anything, or to carry

passengers or property for hire. Given that courts routinely hold that renters maintain a legitimate expectation of privacy despite engaging in behavior that is prohibited by such a section, this Court should find that a similar violation by an unlisted driver does not vitiate that driver's legitimate expectation of privacy in a rental car borrowed from the renter.

ARGUMENT

I. Renters have a legitimate expectation of privacy in rental cars, even if they have committed technical or serious breaches of their rental agreements.

For a defendant to have standing to challenge a search, the defendant must have "a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A "legitimate expectation of privacy" is a subjective expectation of privacy in the invaded place that "society is prepared to accept as reasonable." *Id.* at 143. A renter can have a legitimate expectation of privacy in a rental car "during the term of the lease because the contractual relationship grants the lessee a property interest in the car for a finite term." *Hall v. State*, 477 S.E.2d 364, 366 (Ga. App. 1996).

A renter can also have a legitimate expectation of privacy in a rental car even after the expiration of the lease. Both federal circuit courts to address the issue have held that a renter retains control and possession over an overdue rental car, affording the renter a legitimate expectation of privacy, in the absence of the rental car company attempting to repossess the car. *See United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2000) (finding that "a lessee has a reasonable expectation of privacy in a rental car on which the lease has expired"); *United States v. Cooper*, 133 F.3d 1394, 1402 (11th Cir.

1998) ("[W]e hold that society is prepared to accept as reasonable Cooper's expectation of privacy in the overdue rental car and, therefore, he has standing to challenge law enforcement's search of the glove compartment, the trunk and the items therein."). In *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006), the Ninth Circuit referred to a renter possessing a rental car after the lease has expired as a "technical violation of a leasing contract" that is insufficient to vitiate the renter's legitimate expectation of privacy.

Courts have also found that serious, and even illegal, breaches of rental car agreements are insufficient to vitiate a renter's legitimate expectation of privacy in a rental car. For example, in *United States v. Walton*, 763 F.3d 655 (7th Cir. 2014), a renter with a suspended license rented a car and was pulled over while illegally transporting seven kilograms of cocaine in the rental car. The government claimed that the renter lacked a legitimate expectation of privacy in the rental car for two reasons. First, the government claimed that because the renter had a suspended licence, he breached the provision of the rental agreement that required him to warrant that he possessed "a valid driver's license." *Id.* at 664. Second, the government alleged that the renter's transportation of cocaine breached the provisions of the rental agreement that (1) stated the "[v]ehicle may not be used...for any illegal purposes, or in the commission of a crime;"

and (2) warned the renter that "ANY PROHIBITED USE OF THE VEHICLE...WILL VOID" the agreement. *Id.*

The Seventh Circuit disagreed, concluding that "[t]he government's proposed standing exception—that drivers have no expectation of privacy in a rental car if they breach the rental agreement—would swallow the general rule" that renters have a legitimate expectation of privacy in rental cars. *Id.* at 665. Indeed, the court noted that "[t]he government's proposed rule would also lead to other absurd results." *Id.* For example, the car rental agreement also contained provisions stating that a renter could not "push or tow anything" or engage in any "willful, wanton, or reckless misconduct," including "carrying passengers in excess of the number of seat belts in the Vehicle," "refueling the vehicle with the wrong type of fuel, *i.e.* diesel in gasoline engine," and "failure to use seat belts." *Id.* According to the court,

> Many drivers of rental cars must transgress certain provisions of this rental agreement, yet they undoubtedly regard the space inside the car as private while they possess it. An ordinary person would not expect his rental car to be open to public viewing or police inspection as a result. Society is willing to recognize a privacy interest

> in a car even if the driver does not mind her P's and Q's at all times.

Id.

Indeed, if a renter lost their legitimate expectation of privacy based upon illegal behavior, "*no defendant* would be able to challenge a search of a rental car" that uncovered contraband because "[r]ental car contracts typically contain boilerplate language that the car is not to be used for illegal purposes." *United States v. Jeter*, 394 F.Supp.2d 1334, 1343 (D.Utah 2005). Therefore, a holding that a renter loses their legitimate expectation of privacy by using a rental car for illegal purposes would effectively overrule "the result in dozens of cases that hold that a defendant validly in possession of a rental car does indeed have the ability to challenge a search." *Id.*

II. A person who properly borrows a car with the owner's permission has a legitimate expectation of privacy in the car.

A person who borrows a car with the owner's permission has a legitimate expectation of privacy in the car. While a borrower does "not have the full panoply of ownership, he has some property or possessory rights." *Matthews v. State*, 431 S.W.3d 596, 607 (Tex. App. 2014). When the owner gives a

borrower the keys to a car and permission to use it, the borrower's "presence in the car is authorized" and they have control over the car and the right to exclude others from it. *Id.* Therefore, "[s]everal federal circuits recognized [a] privacy interest [in borrowed cars] decades ago." *Id.*; *see, e.g., United States v. Gibson*, 708 F.3d 1256, 1277 (11th Cir. 2013) ("We have held that an individual who borrows a vehicle with the owner's consent has a legitimate expectation of privacy in the vehicle and standing to challenge its search while it is in his possession.").

The same analysis applies in the rental car context. It is undisputed that someone who borrows a rental car from a renter in accordance with the rental agreement can have a legitimate expectation of privacy in the rental car. For instance, if a renter lists someone as an "authorized driver" on a rental agreement, that person can borrow the car from the renter and have a legitimate expectation of privacy in the rental car. *See, e.g., Johnson v. United States*, 604 F.3d 1016, 1020 (7th Cir. 2010) ("Similar to an owner driving the car, the authorized driver may have an expectation of privacy in that circumstance."); *cf. United States v. Smith*, 263 F.3d 571, 587 (6th Cir. 2001) (finding that a husband had a legitimate expectation of privacy in his wife's rental car even though he was not listed as an authorized driver).

III. A renter can give an unlisted driver permission to use, but not drive, a rental car, creating a legitimate expectation of privacy.

When a person owns a car, they can give someone permission to use, but not drive, the car, creating a legitimate expectation of privacy. *See, e.g., Esmond v. Liscio*, 224 A.2d 793, 796 (Pa. 1966) (noting that a father had given his son permission to use, but not drive, his car). For example, in *United States v. Howard*, 210 F.Supp.2d 503 (D. Del. 2002), the defendant had his license revoked. Subsequently, the defendant's girlfriend gave the defendant the key to the car and permission to use, but not drive, the car. *Id.* at 512. After meeting with his probation officer, the defendant walked toward the car and put the key in the door. *Id.* at 514 At this point, two probation officers stopped the defendant and eventually searched the car and seized two handguns from it. *Id.*

The government claimed that the defendant did not have standing to challenge the search because his girlfriend "gave him permission to be in the vehicle, but not to drive it." *Id.* at 512. The district court disagreed, concluding that while a thief has no reasonable expectation of privacy in a stolen vehicle, "the facts of this case are different." *Id.* Specifically, the facts demonstrated that the car was not stolen and that the defendant "possessed the car legally." *Id.* According to the court, "[t]here is a substantial

difference between a person who exceeds their rights to a borrowed car and a person who steals a car" because "[t]he borrower has some right to use the vehicle in a limited way whereas the thief does not and never will." *Id.*

Many, and arguably all, of the cases concluding that an unlisted driver does not have a legitimate expectation of privacy in a rental car are premised on the presumption that the renter lacks the authority to give control of a rental car to an unlisted driver. *See, e.g., United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990) ("Lawless had no authority to give control of the car to Boruff."); *United States v. Alexis*, 169 F.Supp.3d 1303, 1311 (S.D. Fla. 2016) (same); *United States v. Crisp*, 542 F.Supp.2d 1267, 1278 (M.D. Fla. 2008) (same); *People v. Bower*, 685 N.E.2d 393, 397 (Ill.App.3d 1997) (same); *Colin v. State*, 646 A.2d 395, 404 (Md.App. 1994) (same).

Rental car agreements, however, merely preclude unlisted drivers from driving or operating a rental car; they contain no prohibition on an unlisted driver using or controlling the rental car. For example, the rental agreement in the case at hand stated that "PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT." C.A. App. 73. Under such a clause, a renter can give a borrower permission to use, but not drive, a rental car, just as a car owner can give similar limited permission to a borrower. *See, e.g., Crowder v. Carroll*, 161 S.E.2d

235, 237 (S.C. 1968) (noting how parents had given their unlicensed son permission to use, but not drive, the family car).

Courts have typically found that a person has a legitimate expectation of privacy in a car if she has possession of the car, permission of the owner, holds a key to the car, and had the right and ability to exclude others, except the owner. *See, e.g., United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) ("Montellano had both permission to use his friend's automobile and the keys to the ignition and the trunk, with which he could exclude all others, save his friend, the owner."); *United States v. Ochs*, 595 F.2d 1247, 1253 (2nd Cir. 1979) ("Just as was the case with Jones and his friend's apartment, Ochs 'not only had permission to use' the car but 'had a key' to it."); *United States v. Cabrera*, 2017 WL 4799790 (D. Nev. Oct. 24, 2017) (quoting *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006) (noting that "'a defendant may have a legitimate expectation of privacy in another's automobile if the defendant is in possession of the automobile, has the permission of the owner, holds a key to the automobile, and has the right and ability to exclude others, except the owner, from the automobile'").

It is easy to imagine several scenarios in which a renter could give an unlisted driver permission to use and control a rental car without violating an "authorized driver" clause in a rental agreement. First, assume that the renter in this case drove with

Petitioner to a job interview and left him with the rental car and its key while she interviewed for a couple of hours. If Petitioner remained with the car in the parking lot, he would have had possession of the car, permission of the renter that was consistent with the rental car agreement, the key to the rental car, and the ability to exclude others from the car. In this case, Petitioner would have had control of the car and a legitimate expectation of privacy in it. *Cf. State v. Walker*, 1989 WL 998022, at *1 (Del. Super. Aug. 3, 1989) (finding that a person had control over a car when its owner/driver gave him its keys and told him to wait in the car).

Second, assume that the renter and the petitioner were at a party and the renter gave the petitioner the key to the rental car so that he could listen to music for the last couple hours of the party because he was feeling ill. *Cf. State Farm Mut. Auto. Ins. Co. v. Colby*, 82 A.3d 1174, 1176 (Vt. 2013) (noting how the decedent borrowed a car with the understanding "that he was not going to drive the car but was going to listen to the car radio"). Again, the petitioner would have had possession of the car, permission of the renter that was consistent with the rental car agreement, the key to the rental car, and the ability to exclude others from the car. Therefore, again, the petitioner would have had control of the car and a legitimate expectation of privacy in it.

Third, assume that the renter in this case lived in a high-crime neighborhood and dropped off a rental

car and its key at Petitioner's house and told him to watch the car while the renter went to work for the day. Petitioner would have had control over the car and the right to exclude others from the car even though he was an unlisted driver; indeed, he would have been given the car for the explicit purpose of excluding others from the car. As long as the petitioner did not drive the car, he would be acting in accordance with the rental car agreement and not in contravention of the rental car company's proprietary interest in the car. Therefore, the petitioner would have a legitimate expectation of privacy in the car and standing to challenge a search of it. *Cf. United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006) ("[A] defendant may have a legitimate expectation of privacy in another's car if the defendant is in possession of the car, has the permission of the owner, holds a key to the car, and has the right and ability to exclude others, except the owner, from the car.").

Fourth, assume that the renter knew that Petitioner was interested in the type of car that was rented but had concerns about the amount of space in its trunk. In this case, the renter could have dropped off the car and its keys at Petitioner's house and allowed him to test the trunk space while the renter was at work for the day. Again, Petitioner would have had control over the car and the right to exclude others from it. Accordingly, if he placed pieces of luggage in the trunk to test its size, he

undoubtedly would have a legitimate expectation of privacy in the rental car and standing to challenge a search of it. *Cf. People v. Zepeda*, 2007 WL 530027, at *5 (Cal. App. Feb. 22, 2007) ("Here, the evidence established that, although not allowed to drive his putative wife's car, Chavez had her permission to store his personal property in the car and to use the hidden key to gain entry into the car to retrieve that property, as well as to honk the horn as a signal to her that he had arrived.").

Alternatively, an unlisted driver could even have a legitimate expectation of privacy based upon the renter giving the unlisted driver more limited use of a rental car. For instance, in *People v, Ferris*, 9 N.E.3d 1126, 1135–36 (Ill. App. 4th Dist. 2014), the court collected cases to reach the conclusion that a passenger who had a set of keys to a car and was storing his clothes in the car during a long road trip had a legitimate expectation of privacy in the car even though he was not driving it. It is easy to imagine a scenario in which the car being used on a road trip was a rental car, with an unlisted driver having a similar expectation of privacy as the passenger in *Ferris*.

Relatedly, in *United States v. Hunter*, 663 F.3d 1136, 1144 (10th Cir. 2011), the United States Court of Appeals for the Tenth Circuit found that an unlisted driver had authority to consent to a search of a rental car even when she was not driving the car. According to the court, "there is no legal

authority which expressly states that only the named person on a rental car agreement can authorize a search of a rented car." *Id.* This line of reasoning supports the proposition that an unlisted driver can have a legitimate expectation of privacy given that many have concluded that authority to give consent to a search and a legitimate expectation of privacy "go hand in hand." *United States v. Karo*, 468 U.S. 705, 724 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

IV. An unlisted driver driving a rental car with the renter's permission is an unauthorized use, not an unauthorized taking, and insufficient to vitiate the legitimate expectation of privacy.

The opinions holding that unlisted drivers lack a legitimate expectation of privacy in rental cars are premised upon two related presumptions. The first is that the unlisted driver lacks the owner's permission to use the vehicle and is therefore not in lawful possession of the vehicle. *See, e.g., United States v. Kennedy*, 638 F.3d 159, 165 (3d Cir. 2011) (finding that, unlike the renter, an unlisted driver does not have "lawful possession of the vehicle"); *United States v. Worthon*, 520 F.3d 1173, 1183 (10th Cir. 2008) (finding that an unlisted driver was not in lawful possession or custody of a rental car); *United States v. Roper*, 918 F.2d 885, 888 (10th Cir. 1990) ("He was not the owner nor was he in lawful

possession or custody of the vehicle."); *Colin v. State*, 646 A.2d 1095, 1100 (Md. App. 1994) (finding that an unlisted driver did not have any separate arrangement giving him permission to use the vehicle).

As the last section makes clear, however, when a rental car company rents a car to a renter, it gives the renter both permission to *use* the vehicle and permission to *drive* the vehicle. An "authorized driver" clause only precludes the renter from giving an unlisted driver permission to *drive* the rental car; it does not preclude the renter from giving an unlisted driver permission to *use* the rental car. Therefore, an unlisted driver who obtains permission of the renter to use the rental car has constructive permission from the owner—the rental car company—to use, but not drive the vehicle. Accordingly, when an unlisted driver drives the rental car under these circumstances, the unlisted driver is engaging in an unlawful use, not an unlawful taking, and has a legitimate expectation of privacy in the rental car. *Cf. United States v. Howard*, 210 F.Supp.2d 503, 512 (D. Del. 2002) ("There is a substantial difference between a person who exceeds their rights to a borrowed car and a person who steals a car" because "[t]he borrower has some right to use the vehicle in a limited way whereas the thief does not and never will.").

An analogy can be found in insurance laws that preclude operators of unlawfully taken vehicles from

receiving insurance benefits. For instance, in *Monaco v. Home-Owners Ins. Co.*, 896 N.W.2d 32, 34 (Mich. App. 2016), a mother filed a claim for benefits with her insurance company on behalf of her daughter, who had gotten into an accident while driving her mother's car by herself while having only a learner's permit. The insurance company claimed that the daughter "had taken the vehicle unlawfully regardless of any possible parental permission, considering that, in light of [her] age and the restricted nature of the driver's permit, plaintiff had violated the law by allowing or authorizing [her daughter's] unaccompanied operation of the car." *Id.* at 35. Therefore, the company alleged that the daughter was not entitled to insurance benefits under a Michigan law which stated that a person is not entitled to insurance benefits if "[t]he person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully." MCL 500.3113(a).

The counter-argument was that the daughter "had taken the vehicle lawfully" based upon her mother's testimony that her daughter "had permission to take and drive the car on her own at the time of the accident." *Monaco*, 896 N.W.2d at 35. Therefore, under this counter-argument, the daughter's "lack of a driver's license that would have

allowed her to drive on her own was irrelevant with respect to whether she took the car lawfully." *Id.*

The Court of Appeals of Michigan found that the daughter was not precluded from receiving insurance benefits under the Michigan law because "'the terms 'take' and 'use' are not interchangeable or even synonymous; obtaining possession of an object is very different from employing that object or putting it into service.'" *Id.* (quoting *Amerisure Ins. Co. v. Plumb*, 766 N.W.2d 878, 885 (Mich App. 2009)). Therefore, "'the unlawful use of a vehicle...is not relevant under the unlawful taking language in MCL 500.3113." *Id.* (quoting *Rambin v. Allstate Ins. Co.*, 852 N.W.2d 34, 42 (Mich. 2014)).

As a result,

> Although it may have been unlawful for plaintiff, as owner of the car, to authorize or permit [her daughter] to drive the vehicle in violation of the law, it had no bearing on, nor did it negate, the authorization and permission given by plaintiff for [her daughter] to take the vehicle. [Her daughter] did not "gain[] possession of [the] vehicle contrary to Michigan law". . . ; rather, she unlawfully used the vehicle.

Id. at 38.

A similar analysis applies in the case at hand. Although the rental agreement may not have allowed the renter to authorize Petitioner to drive the rental car, it had no bearing on, nor did it negate, the authorization given by the renter for Petitioner to take the vehicle.

The question then becomes whether Petitioner's breach of the rental agreement by driving the rental car was significant enough to vitiate his legitimate expectation of privacy in the rental car. This takes us to the second presumption made by courts which have concluded that unlisted drivers lack a legitimate expectation of privacy in rental cars: that the driving of a rental car by an unlisted driver is different in magnitude than the breaches by renters who maintain a legitimate expectation of privacy in rental cars.

For instance, in *United States v. Kennedy*, 638 F.3d 159, 166 (3d Cir. 2011), the Third Circuit recognized the precedent holding that a renter maintains a legitimate expectation of privacy in a rental car kept past the expiration of the lease term. The court, though, found that this scenario did not provide a useful analogy to the unlisted driver scenario because "[t]he risk of additional harm to or loss of leased property is likely to be small and easily quantifiable where the lessee merely maintains possession of the property past the expiration of the lease agreement." *Id.* at 167. Indeed, the court noted that car rental agreements typically contain clauses

charging renters a pro rata fee based upon the additional time that the car is used past the expiration of the lease term. *Id.* The court contrasted this type of "technical" breach with the more serious, and unquantifiable, breach that occurs when an unlisted driver drives a rental car. *See id.*

The proper analogy, however, is the one between an unlisted driver driving a rental car and a renter who commits a serious breach or multiple serious breaches of a rental agreement. As noted, courts have consistently held that renters maintain legitimate expectations of privacy in rental cars even when they commit serious, and even illegal, breaches of rental car agreements. *See, e.g., United States v. Walton*, 763 F.3d 655, 664 (7th Cir. 2014) (finding that a renter maintained a legitimate expectation of privacy in a rental car despite using the car to commit illegal acts in breach of the rental agreement); *United States v. Jeter*, 394 F.Supp.2d 1334, 1343 (D. Utah 2005) (finding that a ruling that a defendant lost a legitimate expectation of privacy in a rental car by committing illegal acts would effectively overrule "the result in dozens of cases that hold that a defendant validly in possession of a rental car does indeed have the ability to challenge a search").

The prohibition on unlisted drivers driving rental cars is often contained in the same section of rental agreements as the prohibition on renters engaging in criminal behavior. For example, the Budget Rental

Car agreement currently states that it is a violation of the agreement if

> You use or permit the car to be used: 1) by anyone other than an authorized driver, as defined in paragraph 6; 2) to carry passengers or property for hire; 3) to tow or push anything; 4) to be operated in a test, race or contest, or on unpaved roads; 5) while the driver is under the influence of alcohol and/or a controlled substance and/or otherwise impaired; 6) for conduct that could be charged as a crime such as a felony or misdemeanor, including the transportation of a controlled substance or contraband, or illegal devices; 7) recklessly or while overloaded; or 8) if the car is driven into Mexico without our expressed permission.

Budget Rental Car Agreement for United States & Canada, *available at* https://goo.gl/obqMwQ.

Meanwhile, the rental agreement for Avis, the company from which the car was rented in the case at hand, currently states that it is a violation of the agreement if

> You use or permit the car to be used: 1) by anyone other than an authorized driver, as defined in paragraph 5; 2) to

> carry passengers or property for hire; 3) to tow or push anything; 4) to be operated in a test, race or contest, or on unpaved roads; 5) while the driver is under the influence of alcohol and/or a controlled substance; 6) for conduct that could be charged as a crime such as a felony or misdemeanor, including the transportation of a controlled substances or contraband; 7) recklessly or while overloaded; or 8) if the car is driven into Mexico without our expressed permission.

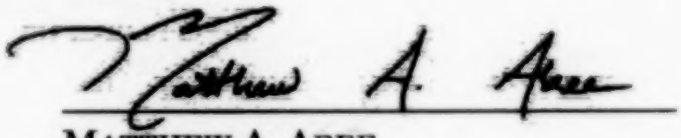
Avis Rental Car Agreement for United States and Canada, *available at* https://goo.gl/6t8oGQ.

Given that courts have consistently held that renters do not lose their legitimate expectation of privacy in rental cars by engaging in illegal behavior, it is difficult to see how unlisted drivers should not lose their legitimate expectation of privacy in properly borrowed cars by improperly driving them. Both violations are covered by the same section of car rental agreements as the section that precludes renters from engaging in illegal behavior, and both breaches seem equally serious and unquantifiable.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,



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No. 16-1371

IN THE
Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus Curiae the National Association for Public Defense (NAPD) is an association of nearly 15,000 public defenders and other professionals who have sought to ensure that indigent clients secure their constitutional right to effective assistance of counsel.* NAPD members are advocates in jails, courtrooms, and communities, as well as experts in best practices and the practical, day-to-day representation of criminal defendants. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned-counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and a diversity of traditional and holistic practice models.

NAPD has a deep interest in the correct interpretation of laws and constitutional provisions affecting the rights of criminal defendants—particularly defendants who cannot afford to hire private counsel. To that end, NAPD has participated as *amicus curiae* in numerous criminal cases before this Court. *See, e.g.*, *Manuel* v. *City of Joliet, Ill.*, 137 S. Ct. 911 (2017); *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017); *McWilliams* v. *Dunn*, 137 S. Ct. 1790 (2017); *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352 (2016); *Torres* v. *Lynch*, 136 S. Ct. 1619 (2016); *United States* v. *Bryant*, 136 S. Ct. 1954 (2016).

Amicus Curiae the National Association of Federal Defenders (NAFD) was formed in 1995. It is a nationwide, non-profit, volunteer organization whose

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* Pursuant to this Court's Rule 37, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of individuals in federal court, including thousands who are subject to searches and seizures.

NAFD has both particular expertise and interest in the subject matter of this litigation. It has submitted briefs as *amicus curiae* in a number of cases before this Court. *See, e.g.*, *Carpenter* v. *United States*, 137 S. Ct. 2211 (2017); *Navarette* v. *California*, 134 S. Ct. 1683 (2014); *United States* v. *Wurie*, 134 S. Ct. 999 (2014); *Bailey* v. *United States*, 133 S. Ct. 1031 (2013); *Maryland* v. *King*, 133 S. Ct. 1958 (2013).

NAPD and NAFD agree with petitioner that individuals have a constitutionally protected reasonable expectation of privacy when they drive rental cars with the permission of the renter, but not the owner. The Third Circuit's opinion in this case defies widely shared social expectations and misconstrues the historical property rights of third-party users. It also disproportionately affects individuals who lack the resources to own property in their own name. The decision should be reversed.

SUMMARY OF ARGUMENT

Our Founders knew that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 274 (1973) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)). To prevent such abuses, the Fourth Amendment has for more than 200 years played an "indispensable" role in ensuring the people's "full enjoyment of the rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833). These protections are no less critical today than they were in prior centuries. Modern technological and societal developments do not render our rights "any less worthy of the protection for which the Founders fought." *Riley* v. *California*, 134 S. Ct. 2473, 2494–95 (2014). And it has been long-recognized that these privacy protections are just as essential for low-income persons as they are for those who are economically advantaged. *See Miller* v. *United States*, 357 U.S. 301, 307 (1958) ("The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!") (quoting remarks by William Pitt, Earl of Chatham). Courts must therefore resist invitations to ease the Fourth Amendment's reins on government power.

This case offers the Court an opportunity to reaffirm the Fourth Amendment's vital role in protecting the privacy rights of all people—rich and poor alike. The boilerplate terms of rental agreements cannot

constrain or define the Fourth Amendment's protections, especially as these agreements function as contracts of adhesion for the significant number of low-income people who use car-sharing arrangements. The Third Circuit's contrary rule puts unlisted rental car drivers in a Fourth-Amendment-free zone, where police officers may search as they please without constitutional constraint. That rule is profoundly wrong and will negatively affect low-income communities. The Court should reverse.

I. The Fourth Amendment looks to "the everyday expectations of privacy that we all share" to determine those privacy interests society is prepared to recognize as reasonable. *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Under this standard, drivers of rental vehicles have a reasonable expectation of privacy, whether or not someone has listed them in the rental agreement.

The increasing use of rental vehicles and other car-sharing arrangements in today's society underscores the importance of Fourth Amendment protections. As of 2016, 40.6 million people in the United States live in poverty. *See* Jessica L. Semega et al., U.S. Census Bureau, *Income and Poverty in the United States: 2016* 12 & fig. 4 (Sept. 2017). While car usage has become a hallmark of modern life, a large number of these low-income people cannot afford to buy or lease one. In fact, 24% of those in poverty do not own a car. *See* National Household Travel Survey, *Mobility Challenges for Households in Poverty* 2 (2014), http://nhts.ornl.gov/briefs/PovertyBrief.pdf. At the same time, low-income communities regularly pool their resources to increase socioeconomic mobility and the efficient use of resources, and are therefore more likely to rely on car-sharing arrangements, including use of a vehicle that another person rented.

The regularity with which rental cars are operated by unlisted drivers demonstrates how contrary the Third Circuit's rule is to the everyday practices and expectations of society. Indeed, many courts have recognized that use of a rental vehicle by an unlisted driver is eminently foreseeable and, in fact, routine. *See, e.g.*, *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996). Unlisted persons who operate rental vehicles are acting in conformity with—not contrary to—those "everyday expectations of privacy that we all share." *Olson*, 495 U.S. at 98.

The Fourth Amendment protects the privacy of all people. But for those of lesser means, what is true in theory is not always true in fact. In many different contexts and for many different reasons, low-income individuals are already left with reduced privacy protections. A rule that conditions Fourth Amendment rights on the terms of a contract of adhesion will only exacerbate this harm. It is well understood that low-income people are uniquely susceptible to the harms posed by contracts of adhesion. As a result, such persons are often stuck with lengthy and detailed contract terms that they do not understand and over which they have no control. Enforceable or not, the widespread use of these types of contracts does not determine the reasonable expectations of those who sign them—much less the reasonable expectations of those who never see the rental-car contract because they did not rent the vehicle.

II. While the Fourth Amendment's protections are not *defined* by principles of property law, the Court has made clear that property interests remain vital to determining the reasonableness of privacy expectations for Fourth Amendment purposes. *See, e.g.*, *Florida* v. *Jardines*, 569 U.S. 1, 11 (2013). The Third Cir-

cuit's rule, however, disregards longstanding principles of property law that confer on bailees (and sub-bailees) a possessory interest in the bailed property.

Bailees (and sub-bailees) have historically had the authority to exclude third persons from use of the bailed property and the corresponding duty to care for the property on behalf of the bailor. These principles of bailment law remain in full force today and are no less worthy than other property law principles that trigger Fourth-Amendment protection. *See, e.g.*, *United States* v. *Jones*, 565 U.S. 400, 405–06 (2012). The fact that a third-party rental car driver does not hold title to the vehicle and is not listed in the rental agreement does not diminish the strength of the sub-bailee's property interest in the bailed property. That explains why courts have repeatedly acknowledged the possessory interests of sub-bailees, even while recognizing that they are not listed in the rental agreement. *See, e.g.*, *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. App. 1996).

The unlisted status of a rental car driver is no basis for disregarding that driver's reasonable expectation of privacy, nor is it a basis for discounting the driver's recognized property interest in the vehicle. And contrary to the Third Circuit's myopic focus on the wording of rental agreements, courts have repeatedly refused to enforce such provisions in the very context in which they are meant to have the most force: insurance coverage. *See, e.g.*, *Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982). The fact that a driver is not listed in the rental agreement is an exceedingly frail basis for withholding the Fourth Amendment's indispensable protections.

ARGUMENT

I. THE FOURTH AMENDMENT PROTECTS THE PRIVACY EXPECTATIONS OF THOSE WHO RELY ON RENTAL VEHICLES.

This case involves the scope of the Fourth Amendment's protections for drivers of rental cars who have the permission of the lessee but not the owner, a right defined by "reasonable expectation[s] of privacy." *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Whether an unlisted rental-car driver has a reasonable expectation of privacy hinges on what "society is prepared to recognize as 'reasonable,'" *id.* at 361, and on "the everyday expectations of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990).

This inquiry does not give license to ignore the significant population that uses rental cars. A rule that removes Fourth Amendment protection for drivers whose names are left off rental agreements would ignore society's reasonable expectations and, in particular, the expectations of lower socioeconomic communities that rely on car-sharing arrangements.

A. THE FOURTH AMENDMENT RECOGNIZES THE REASONABLE EXPECTATIONS OF LOWER SOCIOECONOMIC COMMUNITIES WHO INCREASINGLY RELY ON A SHARING ECONOMY.

A rule that constrains Fourth Amendment protections to the terms of rental contracts would ignore the reasonable expectations of low-income communities that frequently use car-sharing services, including rental cars, to mitigate or escape the cycle of poverty.

1. People Of Limited Means Make Frequent Use Of Car-Sharing Arrangements.

Cars are essential in our society. Unlike prior generations, the majority of the U.S. population—more than 85%—drives to work. U.S. Department of Transportation, Bureau of Transportation Statistics, *Table 1-41: Principal Means of Transportation to Work* (2016), https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_41.html. Just as automobiles have transformed the way people travel, technological and cultural developments have changed the way people access automobiles. The "sharing economy"—in which assets are loaned between members of community networks—has played a key role in altering how individuals use cars. "Instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them. Ownership is no longer the ultimate expression of consumer desire." Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. Consumer Res. 881, 881 (2012) (citation omitted).

Rental cars and other car-sharing arrangements are a feature of this new economy, as Americans increasingly "rent their cars, instead of buying them." Matt Phillips, *Why More and More Americans Are Renting Cars Instead of Buying Them*, Quartz (June 2, 2014), https://qz.com/214922/why-more-and-more-americans-are-leasing-cars-instead-of-buying-them/. Revenues from car-sharing services, such as Zipcar, have grown from $253 million in 2009 to over $3 billion in 2016. *See* Bardhi & Eckhardt, *supra*, at 886. The number of cars being "shared" commercially has also grown significantly in the past decade. In 2006, there were 117,656 users of 3,337 vehicles in all of

North America. *See* Susan Shaheen & Adam Cohen, Transportation Sustainability Research Center, *Innovative Mobility Carsharing Outlook: Carsharing Market Overview, Analysis, and Trends* 3 (2016), http://innovativemobility.org/wp-content/uploads/2016/02/Innovative-Mobility-Industry-Outlook_World-2016-Final.pdf. By 2014, more than 1.6 million people were using over 24,000 vehicles in the same region. *Ibid.*

Likewise, revenues from U.S.-based car rental operations exceeded $28 billion in 2016—up approximately $1.3 billion from the prior year. *See* Auto Rental News, *2016 U.S. Car Rental Market: Fleet, Locations, and Revenue* (2017), http://www.autorentalnews.com/fc_resources/pdf/u-s-car-rental-market-data.pdf. And the number of rental cars in operation nationwide has increased dramatically as well, rising from 1.5 million vehicles to 2.3 million over the past two decades. *See* Auto Rental News, *U.S. Rental Car Market, 1995–2005* (2005), http://www.autorentalnews.com/fc_resources/2005uscarrentalfleet.pdf; Auto Rental News, *2016 U.S. Car Rental Market*, *supra*.

This trend has magnified economically disadvantaged communities' reliance on rental cars and the sharing economy more generally. As of 2016, 40.6 million people in the United States live in poverty. Jessica L. Semega et. al., U.S. Census Bureau, *Income and Poverty in the United States: 2016* 12 & fig. 4 (Sept. 2017). Yet, despite the dominant role of cars in today's society, 24% of households in poverty do not own a car. *See* National Household Travel Survey, *Mobility Challenges for Households in Poverty* 2 (2014), http://nhts.ornl.gov/briefs/PovertyBrief.pdf. The need for cars, especially for those in poverty, has only increased over time. "More U.S. households in poverty live in suburbs than in big cities or rural com-

munities." *See* National Household Travel Survey, *supra*, at 3. But suburban neighborhoods "have fewer [transportation] options compared to more densely populated urban areas" and require farther travel to work, school, daycare, and other life activities. *Ibid.* Those who cannot afford a car and are outside public transportation networks face long daily commutes and few ways to travel.

Members of low-income communities actively participate in the sharing economy by renting cars or "borrowing them from neighbors, friends, or relatives." John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. 49, 57 (2003). Low-income people are twice as likely to travel in multi-occupant vehicles, through car sharing and carpooling. National Household Travel Survey, *supra*, at 1–2. And empirical data show that low-income individuals and families who do not own a car are more likely to use rental car services to meet life's basic demands. *See* Kevin Neels, *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 4–5 & tbl. 2 (2010). Thus, rental vehicles and other car-sharing arrangements offer transportation for low-income people who cannot afford large single payments and do not want (or are unable) to take on long-term debt. *See* Business Leadership for an Inclusive Economy, *An Inclusive Sharing Economy: Unlocking Opportunities to Support Low-Income and Underserved Communities* 5 (Sept. 2016) ("[P]oorer populations benefit more from the sharing economy simply because the cost of ownership for things like cars and vacation homes is so high.").

The collective use of property at the heart of the sharing economy is central to enabling low-income people to leverage networks to increase socioeconomic

mobility and to break the cycle of poverty. *See generally* Silvia Dominguez & Celeste Watkins, *Creating Networks for Survival and Mobility: Social Capital Among African-American and Latin-American Low-Income Mothers*, 50 Soc. Probs. 111 (2003). By aggregating resources, individuals can leverage networks to increase social mobility. *Id.* at 124. "Low-income communities frequently pool resources in order to maximize them. Anchored in strong social networks and the collective mindset of low-income individuals, this practice is at the core of collective assets and casual lending with relaxed reciprocity." Edna R. Sawady & Jennifer Tescher, *Financial Decision Making Processes of Low-Income Individuals* 9 (2008), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ucc08-2_sawady_tescher.pdf.

Thus, the rise of the sharing economy, together with the existing importance of rental cars to lower-income individuals, has resulted in the proliferation of shared rental cars among low-income and minority households. Among those who increasingly rely on rental cars and car-sharing arrangements are many members of society's most disadvantaged groups.

2. Unlisted Drivers Have A Reasonable Expectation Of Privacy In The Rental Cars They Drive.

The role of cars in society, the growing prevalence of the sharing economy, and the expectations and experiences of the numerous low-income persons who rely on rental cars and other car-sharing arrangements inform which privacy expectations society is willing to recognize as reasonable. The Fourth Amendment relies on these expectations, granting protection to "customary social understanding[s]," *Georgia* v. *Randolph*, 547 U.S. 103, 121 (2006), and the "expectations of privacy . . . that are recognized

and permitted by society." *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978). These privacy expectations remain reasonable whether or not the driver is listed in the rental agreement.

Third-party usage of rental vehicles is established and predictable. "Even when there has been an express prohibition against third[-party] drivers," many courts have recognized that it is "reasonably foreseeable that the initial permittee would allow another to use the car." *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996). Courts have described strict bans on third-party drivers as "clearly unrealistic," *ibid.*, "unreasonable," *Roth* v. *Old Republic Ins. Co.*, 269 So. 2d 3, 6 (Fla. 1972), and "run[ning] counter to the recognized realities" of rental-car driving. *Motor Vehicle Acc. Indem. Corp.* v. *Continental Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 185 (N.Y. 1974); *see also Chandler* v. *Geico Indem. Co.*, 78 So. 3d 1293, 1299 (Fla. 2011) ("[A] bailee or lessee of a rented automobile, similarly as its owner, may permit another to operate it (and often does)."). Unforeseen circumstances can arise that require third-party use of a rental vehicle, such as where a driver rents a car "for the ultimate purpose of driving [a] family to a funeral" and then unexpectedly authorizes another driver "because of a last minute work conflict." *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 183.

Permission is given to unlisted drivers with such frequency that courts have been hesitant to give full force to contractual provisions that purport to ban such arrangements. Some courts find that lessors "knew or should have known that the probabilities of the car coming into the hands of another person were exceedingly great," and thus they "constructive[ly] consent." *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 184. And when courts do recognize the validity of

authorized-driver clauses between the rental-car company and the parties to the contract, they have resisted allowing such clauses to affect the rights of those outside the contractual relationship. *See, e.g.*, *Roth*, 269 So. 2d at 5 (noting that the "validity or effect of restrictions on [the use of a rental vehicle], as between the parties, is a matter totally unrelated to the liabilities imposed by law"); *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 350 N.E.2d 616, 617 (N.Y. 1976) ("[T]he legal relationship between the lessor and the lessee is discrete and independent of the obligations of the insurer under the policy of insurance."); *Commonwealth* v. *Campbell*, 59 N.E.3d 394, 402 (Mass. 2016) ("A renter's decision to allow a person who is not a permitted driver according to the rental agreement to drive a rental vehicle may be a breach of that agreement, but it does not also result in a violation of criminal law.").

The Fourth Amendment looks to those "everyday expectations of privacy that we all share." *Olson*, 495 U.S. at 98. The prevalence of cars in our society, the significant reliance of low-income persons on cars and the sharing economy, and the great frequency with which unlisted persons use rental vehicles all confirm the reasonableness of the privacy expectations of unlisted rental-car drivers. Contrary to the Third Circuit's rule, unlisted drivers of rental vehicles are acting in conformity with—not contrary to—the "expectations of privacy . . . that are recognized and permitted by society." *See Rakas*, 439 U.S. at 143 n.12.

B. The Terms Of Rental Contracts Do Not Dictate Which Privacy Expectations Are Reasonable.

The Fourth Amendment equally protects all "persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. Const. Amend. IV.

But low-income neighborhoods experience diminished protections—due to modest living conditions, high crime rates that draw increased law enforcement intrusions, and an inability to afford privacy enhancements available to those with greater means. A rule that ties the rights of rental-car drivers to the terms of contracts of adhesion would only exacerbate this disparity.

1. Low-income individuals "regularly experience privacy deprivations related to their personal information, bodies and homes, and decision making," Michele E. Gilman, *The Class Differential in Privacy Law*, 77 Brook. L. Rev. 1389, 1396 (2012), due in part to more intrusive policing tactics in low-income neighborhoods. Residents in high-crime neighborhoods are more likely to be questioned when walking down the street, to be subjected to stop-and-frisk tactics, to have their homes invaded by police, and to be pulled over. *See* Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 Hastings Const. L.Q. 297, 316–17 (2011).

Poor neighborhoods are also populated by those least able to afford privacy enhancements to keep out unwarranted intrusions. Residents cannot always pay to live in a gated neighborhood or a building with a 24-hour doorman, buy land with a spacious yard, build fences around their property, or ensure soundproof walls. Instead, low-income communities often consist of "crowded apartment complexes in close proximity to others" and "poorly constructed structures that do not adequately conceal noises or activities within." Kami C. Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. Md. L.J. Race Relig. Gender & Class 240, 250 (2015). Poverty is not solely an urban phe-

nomenon, but close-quartered living conditions in cities put more people on the street as pedestrians, or in cars where the opportunities for intrusions on privacy are greater. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo. Wash. L. Rev. 1265, 1272 (1999).

2. Restricting Fourth Amendment protections to the terms of rental-car contracts would compound this burden. Low-income individuals are more likely to engage in transactions with no opportunity to negotiate, to have fewer alternatives if they wish to take their business elsewhere when they discover onerous conditions, and to be unable to afford fees for services—mislabeled as mere "conveniences"—that are part of daily life.

These "widespread disparities in bargaining power" often lead to contracts of adhesion that fail to serve as reliable measures of the parties' reasonable expectations of privacy. *See* Burt Neuborne, *Ending Lochner Lite*, 50 Harv. C.R.-C.L. L. Rev. 183, 197 (2015). Contract law may "attempt[] the realization of reasonable expectations," 1 Arthur L. Corbin, *Corbin on Contracts* 2 (Joseph M. Perillo rev. ed. 1993), but courts have long recognized that boilerplate agreements rarely reflect the "reasonable expectations" of both sides. *See Gaunt* v. *John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947) (Hand, J.) (rejecting the plain reading of an insurance contract because "the ordinary applicant . . . would not by the remotest chance understand the clause as leaving him uncovered").

Standard form contracts have only grown in frequency and complexity. Routine transactions now come with fine-print clauses waiving warranty coverage or "consenting" to limited remedies for defective products. Rental contracts are no different. "We are

given forms to sign when we rent an automobile or an apartment," but "[m]ost of us don't read them, and most of us wouldn't understand them if we did." Margaret J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 7–8 (2013).

The prevalence of one-sided boilerplate does nothing to change people's reasonable expectations of privacy. Blue-collar workers are still surprised to discover that "one in five employees [are] bound by a [non-compete] clause" in their employment contract. *See* Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. Times (June 9, 2017), https://www.nytimes.com/2017/05/13/business/non-compete-clauses.html. And consumers are often "surprised to discover that their rights [have been] severely restricted by the contract they agreed to"—like a cruise line that requires passengers to file suit in a faraway court or a recreational business that can no longer be held responsible even for its own negligence. *See* Alina Tugend, *Those Wordy Contracts We All So Quickly Accept*, N.Y. Times (July 12, 2013), http://www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html.

In short, there is no basis to conclude that society's reasonable expectations of privacy are controlled by the terms of contracts of adhesion. Most people—and poor people in particular—are in no position to negotiate (or simply walk away from) the terms of these contracts, but are instead compelled to accept them. Boilerplate language in contracts "cannot control the paramount constitutional question" whether a person has a reasonable expectation of privacy sufficient to trigger Fourth Amendment protections. *United States* v. *Owens*, 782 F.2d 146, 150 (10th Cir. 1986).

II. DRIVERS WHO OPERATE RENTAL CARS WITH A LESSEE'S PERMISSION ENJOY A POSSESSORY INTEREST PROTECTED BY THE FOURTH AMENDMENT.

Since *Katz*, this Court's Fourth Amendment analysis has focused on the reasonableness of an asserted privacy expectation. At the same time, the Court has clarified that "[t]he *Katz* reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment[.]" *Florida* v. *Jardines*, 569 U.S. 1, 11 (2013) (internal quotation marks omitted). So, while a property interest is not necessary for the Fourth Amendment's protection, property rights remain vitally important to discerning the full breadth of those protections. *See Jardines*, 569 U.S. at 5 (explaining that "though *Katz* may add to the baseline, it does not subtract anything" from the Fourth Amendment's connection to property rights); *see also Rakas*, 439 U.S. at 143 n.12 ("[T]he Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth Amendment].").

Under longstanding principles of property law, an unlisted driver of a rental car holds a possessory interest in the rental vehicle. This property interest underscores the objective reasonableness of an unlisted driver's expectation of privacy and demonstrates the need for Fourth Amendment protection. This need is particularly salient for lower-income persons who often cannot afford to own property outright and who depend on a sharing economy.

A. The Fourth Amendment Protects Property-Based Privacy Interests.

This Court often looks to principles of property law to determine the full scope of the Fourth Amendment. In *United States* v. *Jones*, for example, the Court held that the government conducted a search by attaching a GPS device to a person's car because there was "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." 565 U.S. 400, 405–06 (2012) ("[F]or most of our history, the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates."). So too in *Jardines*, where the Court applied the common law of trespass to hold that the use of a drug-sniffing dog within the curtilage of a home was a Fourth Amendment search. *Jardines*, 569 U.S. at 7; *see also Rakas*, 439 U.S. at 148 (concluding that passengers in a car did not have a reasonable expectation of privacy because the passengers "asserted neither a property nor a possessory interest in the automobile"); *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (observing that "well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass"); *United States* v. *Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) ("[T]he warrantless opening and examination of (presumptively) private correspondence" amounted to "exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment.").

The Fourth Amendment has been held to apply where a person lacks full (or even partial) ownership of an item—a situation often true of low-income persons with respect to homes, vehicles, and other life necessities. *See Chapman* v. *United States*, 365 U.S. 610, 616 (1961) (holding that the Fourth Amendment

protects a leaseholder from a search by the police that was consented to by the landowner); *Minnesota* v. *Carter*, 525 U.S. 83, 95 (1998) (Scalia, J., concurring) ("Of course this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free—so long as they actually live there.") (emphasis omitted).

Thus, overnight guests enjoy Fourth Amendment protection in the home or apartment in which they stay. *See Olson*, 495 U.S. at 98 (holding that an overnight guest has a reasonable expectation of privacy without having absolute control over the home); *Jones* v. *United States*, 362 U.S. 257, 259, 266–67 (1960) (holding that a guest with keys to an apartment, permission to sleep there, and control over the premises when the host was not present had a reasonable expectation of privacy). And the same is true of hotel occupants. *See Stoner* v. *California*, 376 U.S. 483, 484–86, 490 (1964) (holding that a hotel clerk could not consent to the warrantless search of a guest's room); *Hoffa* v. *United States*, 385 U.S. 293, 301 (1966) ("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office."); *see also City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2451 (2015) (holding that a city code requiring hotel operators to provide information about hotel guests to police was invalid under the Fourth Amendment).

Underlying this Court's jurisprudence is a recognition that the Fourth Amendment protects the most essential stick in the property-rights bundle: the right to exclude. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979) (concluding that "the right to exclude others" is "one of the most essential sticks in the bun-

dle of rights that are commonly characterized as property"); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 n.1 (1998) (collecting cases); Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954) (same); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 813 (2004) (describing the right to exclude as "the very essence of the property right").

Minor or even merely constructive intrusions into areas from which the owner may exclude others—such as attaching a GPS device to a vehicle or using a drug-sniffing dog to scour the curtilage of a home—are therefore "searches" under the Fourth Amendment. *See Jones*, 565 U.S. at 402, 413; *Jardines*, 569 U.S. at 11–12; *see also Kyllo*, 533 U.S. at 40 (holding that the use of a thermal-imaging device that did not physically invade a home was nonetheless a search). And this Court has generally allowed warrantless surveillance of constitutionally protected areas only if the search does "not invade the individual's right to exclude others[.]" Kerr, *supra*, at 813.

B. An Unlisted Driver Of A Rental Car Holds A Possessory Interest In The Vehicle That Is Protected By The Fourth Amendment.

Traditional principles of property law demonstrate that unlisted drivers of rental cars have a possessory interest in the vehicles and a corresponding right to exclude anyone but the owner and lessee from their use. Though not necessary for the Fourth Amendment's protections to apply, the existence of this property interest underscores the need for Fourth Amendment protection.

1. The Constitution refers to state law to define the parameters of the property rights it protects. *See Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created . . . from an independent source such as state law."); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 80 (1998) ("[S]tate law typically defines the property rights given constitutional protection against federal officials.").

Bailment law governs the rights and obligations of persons who receive possession of an item from another—whether it be the owner or one who has possession with the owner's permission. A bailment (or sub-bailment) is generally created by (1) the delivery of personal property from one person to another for a specific purpose, (2) the acceptance by the transferee of delivery, (3) an agreement that the purpose will be fulfilled, and (4) an understanding that the property will be returned to the transferor or dealt with as the transferor directs. *See* 8 C.J.S. *Bailments* § 18 (2017). By virtue of this arrangement, the bailee acquires "lawful possession or custody of the thing bailed . . . and a special property or possessory interest in the subject matter of the bailment, which is equivalent to, or in the nature of, actual ownership against anyone other than the bailor" and which "entitles the bailee to hold the property bailed as against third persons." *Id.* § 34. In other words, the bailee (or sub-bailee) acquires a possessory interest in the property and a right to exclude others—a right inferior to the true owner, but superior to others. *See* Joseph Story, *Commentaries on the Law of Bailments* 55 (4th ed. 1846) ("Nay, even a person, who holds property by wrong and without title, may lawfully deposit the same; and he will be entitled to recover back the same against every one but the rightful owner.").

The strength of the bailee's (or sub-bailee's) possessory interest is underscored by the corresponding duty to safeguard the bailed property and the liability to the bailor if this duty is breached. "[O]nce a bailment contract is created between a bailor and bailee[,] . . . the bailee is charged with a duty of care to protect the bailed property from damage or loss." 46 Am. Jur. Proof of Facts 3d 361 (1998); *see also* 8 C.J.S. *Bailments* § 55 (2017) ("The duty of a bailee to protect the bailed property is a legal one arising out of the relationship created by the contract of bailment."). And if the bailee violates this duty—for example, by not taking reasonable measures to prevent third parties from appropriating or damaging the bailed property—then the bailee is "liable for damage to the property," or for its loss. 8 C.J.S. *Bailments* § 58 (2017).

The rights and obligations of bailees have deep roots in the common law. Indeed, "all bailees from time immemorial have been regarded by the English law as possessors, and entitled to the possessory remedies." *See* Oliver Wendell Holmes, Jr., *The Common Law* 175 (1881).[1] As far back as the 18th century, it was understood that "there is a special qualified property transferred from the bailor to the bailee, together with the possession," and "on account of this qualified property of the bailee, he may . . . maintain an action against any such as injure or take away these chattels." 2 William Blackstone, *Commentaries on the Laws of England* 453 (1766). And, at common law, if a person acquired possession of an item without the owner's permission, he was still required "to be diligent, to keep the chattel as his own," or be liable to the

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[1] *See also* Holmes, *supra*, at 221 ("If a bailee intends to exclude strangers to the title, it is enough for possession under our law, although he is perfectly ready to give the thing up to its owner.").

owner. Samuel Stoljar, *The Early History of Bailment*, 1 Am. J. Legal Hist. 5, 22 (1957).

Consistent with these longstanding principles of property law, courts have recognized that a third-party operator of a vehicle is a sub-bailee and therefore holds a legally protected possessory interest in the vehicle. *See, e.g.*, *Moreno* v. *Idaho*, No. 4:15-cv-342, 2017 WL 1217113, at *5 (D. Idaho Mar. 31, 2017) (concluding that a third-party driver was a "sub-bailee" vis-à-vis the person borrowing the vehicle from the owner); *State* v. *Sanders*, 614 P.2d 998, 1000, 1004 (Kan. Ct. App. 1980) (recognizing that a sub-bailee who has possession with the permission of the initial bailee "[stands] in the place of the owner"). Indeed, *Jones* itself applied the Fourth Amendment's protections to an automobile bailee while recognizing the bailee's property interest in the vehicle. *See Jones*, 565 U.S. at 404 n.2 ("If Jones was not the owner he had at least the property rights of a bailee."). And courts have acknowledged the property interests of rental-car sub-bailees, even if they were not listed in the rental agreement. *See, e.g.*, *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. App. 1996) (stating that an unauthorized driver's "use of the [rental] car created a bailment" under state law); *State* v. *Webber*, No. 90,899, 2005 WL 283585, at *1, *4 (Kan. Ct. App. 2005) (holding that an unlisted driver had "a possessory interest in the vehicle" supporting a reasonable expectation of privacy); *United States* v. *Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996) (noting that "if the [unauthorized] driver of a rental car has the permission of the lessee to drive the vehicle, then he has a legitimate possessory interest" in the vehicle).

At the same time, courts have held that a rental car bailee (or sub-bailee) is liable to the bailor whether or not the bailee or sub-bailee was authorized by the owner to have possession. *See Grossman Chevrolet*

Co. v. *Enockson*, 86 N.W.2d 644, 645–47 (N.D. 1957) ("May a bailor maintain an action, against a stranger to the bailment, for damages to a bailed chattel caused by a stranger's negligence? Unquestionably such an action may be maintained."). And, at least in some contexts, a bailee may be held liable for injuries caused by the negligent use of the vehicle by an unauthorized driver. *See Pabon* v. *InterAmerican Car Rental, Inc.*, 715 So. 2d 1148, 1149–50 (Fla. Ct. App. 1998).

2. Under these longstanding principles of property law, an unlisted operator of a rental vehicle—though not owning or holding title to the vehicle—has a cognizable possessory interest in it. *See* Holmes, *supra*, at 175 ("[A]ll bailees from time immemorial have been regarded by the English law as possessors, and entitled to the possessory remedies."). That property interest entitles the sub-bailee of a rental car to exclude others from using the vehicle and obligates the sub-bailee to prevent others from damaging or appropriating it. *See, e.g.*, 8 C.J.S. *Bailments* § 34 (2017) (a bailee holds a "special property or possessory interest" in the bailed property and is entitled "to hold the property bailed against third persons"). No less than the property rights involved in *Jones* or *Jardines*, those implicated here are worthy of Fourth Amendment protection. Indeed, the property interest here is the *same* interest present in *Jones*, which applied the Fourth Amendment's protections to an automobile bailee while recognizing the bailee's property interest in the vehicle. *See Jones*, 565 U.S. at 404 n.2 ("If Jones was not the owner he had at least the property rights of a bailee."). Acknowledging the Fourth Amendment's protection of these property interests adheres to deeply rooted principles of property law while at the same time ensuring that the Fourth Amendment's protection of property benefits all members of society,

whether or not they have the financial means to own a vehicle. *See United States* v. *Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("[T]he Constitution doesn't prefer the rich over the poor[.]").

C. THE TERMS OF RENTAL CAR AGREEMENTS CANNOT NULLIFY FOURTH AMENDMENT PROTECTIONS.

Courts that have held that the Fourth Amendment does not protect unlisted rental car drivers have done so largely because of the rental contract's prohibition on unlisted drivers. *See, e.g.*, *United States* v. *Kennedy*, 638 F.3d 159, 165 (3d Cir. 2011) ("[A]n unauthorized driver [of a rental vehicle] has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude."); *United States* v. *Roper*, 918 F.2d 885, 886–88 (10th Cir. 1990) (finding no reasonable expectation of privacy for an unlisted driver because "[t]he rental contract provided that the car could only be driven by the lessee"). But while these provisions might show that the *lessee* violated the terms of the rental agreement, that fact does not negate the *sub-bailee's* well-established possessory interest in the vehicle. Nor does it undermine the reasonableness of the sub-bailee's expectation of privacy. This is particularly true given that courts have consistently refused to enforce authorized-driver clauses in the very context in which they are meant to apply: insurance coverage. This non-enforcement underscores the inability of such clauses to impair well established property rights or to dictate which privacy expectations society deems reasonable.

Rental-car companies use unlisted driver prohibitions "as a basis for negating omnibus [insurance] coverage which otherwise would have been available to the lessee or his forbidden permittees." Irvin E.

Schermer & William J. Schermer, 1 *Automobile Liability Insurance* § 6:18 (4th ed. 2008). Yet many courts have "refused to permit a violation of the prohibition" to negate insurance coverage. *Ibid.*; *see also "Permissive" Use of Automobile—Delegation of Permission to Second Permittee*, 17 Am. Jur. Proof of Facts 3d 409 (1992) ("[C]ourts in many jurisdictions tend to ignore express prohibitions against delegation."); *Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982) (holding that an unlisted driver "was covered" by the contract's insurance clause because he had permission from the named driver to drive the automobile, despite the rental contract's prohibition of unlisted drivers).

Courts have relied on a variety of theories to reject unauthorized-driver clauses as a basis to negate coverage. Legal doctrines like "implied consent," "lawful possession," and "initial permission" have been employed to "defang" the contractual prohibition on unlisted drivers in the insurance coverage context. Schermer & Schermer, *supra*, § 6:18.

Some courts have refused to allow authorized driver clauses to bar coverage by reasoning that a contrary rule would effectively nullify a central "purpose" of the rental agreement. *See BATS, Inc.* v. *Shikuma*, 617 P.2d 575, 577 (Haw. Ct. App. 1980) (insured was still "using" the rental vehicle even when it was being driven by an unlisted driver, despite the rental contract's unlisted driver prohibition). These courts have recognized that "[r]ental of an automobile is for a broad, almost unfettered use," including allowing unlisted drivers to operate the vehicle. *See State Farm Mut. Auto. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 533 (Mo. Ct. App. 1994).

Other courts have reasoned that an unauthorized-driver clause cannot negate coverage because the unauthorized driver operated the vehicle with the permission of the lessee. Thus, courts have concluded that "[a] person may be in lawful possession" of a rental vehicle "if he is given possession by someone using the automobile with the express permission of the owner even though the permission granted by the owner [does] not include the authority to permit others to operate the automobile." *Ins. Co. of N. Am.* v. *Aetna Life & Cas. Co.*, 362 S.E.2d 836, 839–40 (N.C. Ct. App. 1987). In California, for example, even a "specific admonition not to permit anyone else to drive [a vehicle]" is ineffective because such a prohibition "do[es] not negate the fact that [the vehicle] is being used with the owner's permission." 8 Cal. Jur. 3d *Automobiles* § 529 (2017). Other jurisdictions have adopted similar rules. *See Williams* v. *Am. Home Assurance, Co.*, 297 A.2d 193, 197–98 (N.J. Super. Ct. App. Div. 1972) (holding that insurance coverage extends to an unauthorized driver who is given permission to use the vehicle by an authorized driver because "if a person is given permission to use a motor vehicle in the first instance, any subsequent use, though not within the contemplation of the parties, is a permissive use within the standard omnibus clause"); *State Farm Mut. Auto. Ins. Co.* v. *Budget Rent-A-Car*, 359 N.W.2d 673, 676 (Minn. Ct. App. 1984) (holding that a rental company's insurance policy covered a third party even though he was "an unlisted additional driver" because "subsequent use short of actual conversion or theft" is permissive); *see also Campbell*, 59 N.E.3d at 400 (holding that "authorization to use a rental vehicle may be provided by renters as well as by the rental company in at least some circumstances" regardless of an unlisted driver prohibition).

And still other courts have reasoned that an unauthorized driver's use of a rental vehicle cannot preclude coverage because it is entirely "foreseeable and inevitable that rental vehicles . . . will be operated in violation of a restrictive lease agreement." *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 49 A.D.2d 613, 614 (N.Y. App. Div. 1975), *modified*, 350 N.E.2d 616 (N.Y. 1976). As a consequence, rental car companies do "not have a reasonable basis for believing that" unlisted driver restrictions will "be carried out," and so they are "deemed to have given implied permission to the use of the subject automobile without the said restriction." *Fin. Indem. Co.* v. *Hertz Corp.*, 38 Cal. Rptr. 249, 250, 254 (Cal. Dist. Ct. App. 1964) (affirming district court's findings); *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 184 (concluding that the rental car company "knew or should have known that the probabilities of the car coming into the hands of another person were exceedingly great"); *Unisun Ins. Co.* v. *Hertz Rental Corp.*, 436 S.E.2d 182, 185 (S.C. Ct. App. 1993) (same).

The predictability of unlisted drivers using rental cars has led courts to conclude that rental companies "implied[ly] consent" to unauthorized use of their rental vehicles, despite unlisted driver prohibitions in rental agreements. *See Roth*, 269 So. 2d at 5–7 (noting that "a bailee or lessee of a rented automobile . . . may permit another to operate it (*and often does*)") (emphasis added).[2] Because rental-car companies "kn[ow] or should . . . know[] that the probabilities of the car coming into the hands of another person [are]

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[2] *See also Chandler*, 78 So. 3d at 1297 (noting that rental car companies "in actuality intrust[] th[e] automobile to the renter for all ordinary purposes for which the automobile is rented" and "[t]he fact that the owner had a private contract . . . with the renter" does not change this fact).

exceedingly great," they are "charged with constructive consent." *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 184.

Contrary to the Third Circuit's rule, the fact that a driver is not listed in the rental agreement is an exceedingly frail basis for withholding the Fourth Amendment's "indispensable" protections. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833). The courts' repeated refusal to enforce these provisions shows that they are a poor metric for determining which privacy expectations society deems reasonable. And the fact that courts routinely acknowledge the possessory rights of rental-car bailees and sub-bailees not listed in the rental agreements confirms that unlisted-driver provisions cannot annul a bailee's (or sub-bailee's) existing property interest. *See supra* at 23 (collecting cases). It makes little sense to hinge a driver's Fourth Amendment protections on the fine print of a contractual provision that courts routinely bypass, few people follow, and to which the driver is not a party. At the same time, reliance on these often ignored clauses is particularly unwarranted because it disregards the privacy expectations of low-income persons who make up a significant portion of those who use rental cars and other car-sharing arrangements, and who frequently rely on these services to meet life's basic needs.

* * *

The Fourth Amendment is a guarantee of privacy for all—rich and poor. That guarantee must therefore take account of the circumstances and conditions that define and shape the privacy expectations of all classes of people. "[P]oor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. . . . [T]he man who parks his car next to his trailer is entitled to the same privacy and peace

of mind as the man whose urban fortress is guarded by the Bel Air Patrol." *Pineda-Moreno*, 617 F.3d at 1123 (Kozinski, C.J., dissenting from denial of rehearing en banc).

The Third Circuit's rule fails to live up to this guarantee. By conditioning Fourth Amendment protections in the rental car context on the terms of contracts of adhesion, the Third Circuit's rule relegates the privacy expectations of low-income persons to second-class status—even as low-income persons already endure reduced Fourth Amendment protections. And by ignoring the firmly established property interests of unlisted users of rental vehicles, the Third Circuit's rule forecloses Fourth Amendment protection for those lacking the means to own their own vehicle. *Cf. Carter*, 525 U.S. at 95 (Scalia, J., concurring). Moreover, the Third Circuit's rule does all of this based on provisions in rental agreements that are rarely followed and which courts have repeatedly held unenforceable. That rule does not remotely "implement the high office of the Fourth Amendment to protect privacy." *Randolph*, 547 U.S. at 127 (Roberts, C.J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

TERRENCE BYRD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF NATIONAL MOTORISTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus National Motorists Association ("NMA") is a membership-based organization founded in 1982 to protect and uphold the rights of the driving public. NMA members, located in all 50 States and the District of Columbia, are keenly interested in maintaining safe and responsible highway travel. NMA's activities include advocacy for fair traffic laws and for law-enforcement actions that conform to legal and constitutional standards. NMA also seeks to promote greater trust and mutual respect among the nation's 250 million licensed drivers and law enforcement. NMA therefore has an interest in the correct interpretation and vigorous enforcement of the Fourth Amendment's protection against unreasonable search and seizure.

The purpose of this brief is to bring to the Court's attention two considerations that counsel against the rule applied by the Third Circuit in the decision on review. The first is the rise of car- and ride-sharing services. By departing from the standard-form contracts governing rental-car agreements, the rise of car- and ride-sharing services underscores the unadministrability of any Fourth Amendment rule premised on contractual restrictions rather than individuals' reasonable expectations of privacy. Second, NMA is concerned that the Third Circuit's rule abets and exacerbates the abuse of civil asset

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* also represents that all parties have consented to the filing of this brief.

forfeiture laws by law-enforcement officials. Courts and commentators have recognized that financial incentives may prompt law-enforcement officials to seek out opportunities to seize motorists' assets through asset forfeiture. A rule that denies Fourth Amendment protection to many motorists threatens to further accelerate existing abuses.

SUMMARY OF ARGUMENT

I. Car- and ride-sharing services rely on terms of service that differ in significant ways from traditional rental-car agreements. The rapid growth of such services guarantees that lower courts increasingly will confront questions about how to apply the rule at issue in this case to customers of such services. Because car- and ride-sharing services do not label drivers or passengers as "authorized" in the same way as traditional rental-car agencies, the Third Circuit's rule will raise a host of administrability problems that application of the "reasonable expectation of privacy" standard proposed by petitioner would avoid.

II. Because the Third Circuit's rule guarantees that a significant number of drivers of rental cars will be without Fourth Amendment protection, that rule creates "sitting ducks" for potentially abusive law-enforcement activity. As this case illustrates, law enforcement often can spot rental cars, which, under the Third Circuit's rule, may be subject to search even without reasonable suspicion of any crime. The importance of avoiding that result is underscored by the growth of civil asset forfeiture, which itself has given rise to abuses that the Third Circuit's rule threatens to make worse.

ARGUMENT

Petitioner has explained why he had a reasonable expectation of privacy when driving his fiancée's rental car: he was in possession and control of the vehicle and could exclude third parties from gaining access to it. Petitioner also has explained that the terms of the rental-car agreement between petitioner's fiancée and the rental-car agency do not control whether the driver of a vehicle has such a reasonable expectation of privacy. Indeed, this Court "adhere[s] to the view expressed in *Jones* [*v. United States*, 362 U.S. 257 (1960),] and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control" the Fourth Amendment analysis. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

This brief offers two additional observations about the Fourth Amendment standard applied by the court below. The first is that, in a world of car- and ride-sharing, the suggestion that an individual's reasonable expectation of privacy turns on the degree of "authorization" to operate a particular vehicle implicates administrative complexity that would take the governing standard ever further from the reasonable expectation of privacy that is the touchstone of the Fourth Amendment. The second is that the bright-line distinction that the Third Circuit draws – when applied to a traditional rental-car arrangement like the one at issue here – provides an open invitation to improper and potentially abusive traffic stops and searches.

I. THE RISE OF CAR- AND RIDE-SHARING SERVICES MAKES RELIANCE ON CONTRACTUAL AUTHORIZATION AS THE BASIS FOR FOURTH AMENDMENT PROTECTION UNADMINISTRABLE AND OBSOLETE

It might be argued that, whatever the infirmities of the rule applied below, at least it is clear: a quick look at the rental-car agreement tells the law-enforcement officer whether the Fourth Amendment applies or not. As we discuss below, where this bright-line distinction comes into play, it invites rather than discourages abuse. Furthermore, any administrative benefit is sharply limited by marketplace developments.

The rental-car agreement at issue in this case is a traditional one between a brick-and-mortar agency (Budget) and an individual renter.[2] But rental-car agencies are not, of course, the exclusive way to secure short-term use of cars in the marketplace. The rise of the "sharing economy" means that drivers can now increasingly choose to use car- and ride-sharing services, which are growing rapidly, instead.

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[2] The standard rental agreement in this case is familiar to anyone who has rented a car from a traditional rental-car agency. Indeed, the rental-car contract often is cited as an exemplar of standard-form contracts. *See, e.g.*, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 437 & n.39 (2002) (collecting instances in which rental-car agreements are used as exemplars of form contracts), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1662&context=facpub; Irma S. Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 Loy. L.A. L. Rev. 137, 144 & n.55, 184 & tbl. 1 (2006) ("Currently, the top ten rental car companies all use form contracts."), http://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=1073&context=faculty_lawreviews.

In the sharing economy, the analogue to the traditional rental agreement is significantly more complex. Rather than one standard-form contract that governs nearly every rental on substantially similar terms, each service creates terms of use consistent with its business model. *See, e.g., Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 76-80 (2d Cir. 2017) (describing Uber's Terms of Service). In many cases, those terms of use apply to only a portion of the web of economic relationships between service, driver, rider, and car owner. And, unlike with traditional rental agreements, it can be significantly more difficult for police officers to know who is an authorized user under sharing-economy analogues.

Determining whether a motorist's or passenger's expectation of privacy is reasonable in cases of vehicles rented from a car- or ride-sharing service would be difficult if that question were governed by contractual relationships and property rights. Car- and ride-sharing services operate according to different business models that employ terms of use tailored to the particular model, and they vary in the degree to which they require prior authorization for third-party drivers and passengers.

1. For example, car-sharing services like Zipcar, car2go, Getaround, Enterprise CarShare, Hertz 24/7, and Maven offer to rent cars for time periods shorter than a day, with flexible pick-up and drop-off locations. Boston Consulting Group estimates that, by 2021, 6 million people in North America will be registered users of a vehicle-sharing service.[3] Some car-sharing

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[3] *See* Boston Consulting Group, *What's Ahead for Car Sharing?: Trajectory of Growth and Revenues*, http://bcgperspectives.com/content/articles/automotive-whats-ahead-car-sharing-new-mobility-its-impact-vehicle-sales/?chapter=7#chapter7.

companies – such as Zipcar and car2go – typically operate on a membership model. Customers pay a fee either monthly or upon registration, which gives them the right to use any available vehicle on demand or on very short notice.[4] Other car-sharing services are offered on a peer-to-peer basis: Users sign up to offer their own vehicles for rent by other users, with the sharing company acting as an intermediary.[5]

Membership-based car-sharing services typically restrict driving rights to members. For example, Zipcar's agreement permits other Zipcar members to drive rented vehicles, but only if accompanied by the reserving member and only if listed on that member's online account – but not any written rental agreement.[6] Similarly, car2go allows members to register additional "Co-Drivers" on a single online account.[7]

By contrast, peer-to-peer rental services involve cars that are owned by participants in the peer-to-peer network, rather than cars owned by the service itself. Such services often provide more liberal authorization. Peer-to-peer service Getaround allows renters to let any person who meets its eligibility requirements (which relate to age, criminal history, and license status) drive cars rented from other users, with no

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[4] *See, e.g.*, Zipcar, *How Does Zipcar Work?*, http://www.zipcar.com/how; car2go, *How It Works*, https://www.car2go.com/US/en/#152742 (last visited Nov. 16, 2017).

[5] *See, e.g.*, Getaround, *How It Works*, https://www.getaround.com/tour (last visited Nov. 16, 2017).

[6] *See* Zipcar, *Allowed Drivers* ("Only active members are allowed to drive Zipcars."), https://support.zipcar.com/hc/en-us/articles/220676487-Allowed-Drivers (last visited Nov. 16, 2017).

[7] *See* car2go, *Frequently Asked Questions – Can I share my car2go account?*, https://www.car2go.com/US/en/faq/ (last visited Nov. 16, 2017).

obligation to identify such third-party drivers in advance.[8]

The variations in car-sharing companies' terms of service are unlikely to have any direct impact on whether a motorist has an expectation of privacy when she is operating a vehicle. Furthermore, their very variety – and complexity – demonstrate why tying Fourth Amendment rights to contractual arrangements is unworkable in many situations.

In addition, there is a further practical difficulty: because car-sharing accounts are typically managed online, there is no physical rental agreement inside the vehicle that could be inspected by law enforcement.[9] To the extent car-sharing services rely on lists of authorized drivers, co-drivers, or members, those lists exist in each user's online account, not on a carbon-paper contract in the glovebox. For that reason, the administrative simplicity of the rule applied below would not exist in cases of car-sharing vehicles. *Cf.* JA48 (testimony that arresting officer was "not required to [contact the rental agency or the

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[8] *See* Getaround, *Renter Policy* ("You understand and agree that, should you permit someone else to operate a Car during a Rental on your account, such person has independently reviewed and meets our Eligibility Criteria and would be considered an Authorized Driver at the time of the Rental."), https://www.getaround.com/terms/renter (last visited Nov. 16, 2017).

[9] *See* Zipcar, *Allowed Drivers* ("Only active members are allowed to drive Zipcars. You can share the fun of driving only if your co-pilot is also an active member."), https://support.zipcar.com/hc/en-us/articles/220676487-Allowed-Drivers (last visited Nov. 16, 2017); car2go, *Frequently Asked Questions – Can I share my car2go account?* ("A Co-Driver is someone you trust that you invite to share payment and/or share recent trip history with. You can add a Co-Driver from your online account."), https://www.car2go.com/US/en/faq/ (last visited Nov. 16, 2017).

person listed on the rental-car agreement] because it says no other driver permitted and it was a current contract").

2. Ride-sharing services like Uber, Lyft, and Via are growing even more rapidly than car-sharing services. As of 2016, 15% of adults – and 28% of 18-to-29-year-olds – in the United States had used such a service.[10] According to data reported by the Bureau of Labor Statistics and analyzed by the Brookings Institution, the number of drivers associated with ride-sharing firms grew by 10% from 2012-2013, 34% from 2013-2014, and 63% from 2014-2015 (the latest year for which data are available).[11]

Ride-sharing companies style themselves as platforms that connect drivers with users, rather than as livery or rental-car companies in their own right. Under this model, drivers are contractually deemed to be independent contractors rather than employees of the ride-sharing company.[12] Ride-sharing companies' terms of service differ accordingly from those of either car-sharing services or traditional rental-car agencies.

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[10] *See* Aaron Smith, Pew Research Ctr., *Shared, Collaborative and On Demand: The New Digital Economy* at 17-18 (May 2016), http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/05/PI_2016.05.19_Sharing-Economy_FINAL.pdf.

[11] *See* Ian Hathaway & Mark Muro, Brookings, *Ridesharing Hits Hyper-Growth* (June 1, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/01/ridesharing-hits-hyper-growth/.

[12] *See, e.g.*, Uber, *U.S. Terms of Use* § 3 (effec. Mar. 23, 2017) ("The Services comprise mobile applications and related services . . . , which enable users to arrange and schedule transportation, logistics and/or delivery services . . . under agreement with Uber or certain of Uber's affiliates ('Third Party Providers')."), https://www.uber.com/legal/terms/us.

On the one hand, such companies prohibit customers from allowing other people to use their accounts.[13] As a result, calling an Uber for a friend or family member is generally a violation of Uber's terms of use. On the other hand, ride-sharing companies typically do not themselves own the vehicles their customers ride in; the drivers do. For that reason, each ride is governed by a new agreement between the driver and the passenger.[14]

The introduction of a third party into the web of overlapping agreements governing a customer's use of a vehicle means that there are three separate contracts; by the Third Circuit's reasoning, each of those may bear on the question whether the passenger's expectation of privacy is reasonable.

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[13] *See* Uber, *U.S. Terms of Use* § 4 (effec. Mar. 23, 2017) ("You may not authorize third parties to use your Account . . . ."), https://www.uber.com/legal/terms/us; Lyft, *Lyft Terms of Service* § 3 (last updated Sept. 30, 2016) ("You may not allow other persons to use your User account, and you agree that you are the sole authorized user of your account."), https://www.lyft.com/terms.

[14] *See* Lyft, *Lyft Terms of Service* § 1 (last updated Sept. 30, 2016) ("Each transportation Service provided by a Driver to a Rider shall constitute a separate agreement between such persons."), https://www.lyft.com/terms. That unwritten contract likely incorporates by reference many of the service's terms of use, including with respect to payment, which is made to the service rather than the driver. *See, e.g.*, Uber, *U.S. Terms of Use* § 5 (effec. Mar. 23, 2017) ("You understand that use of the Services may result in charges to you for the services or goods you receive ('Charges'). Uber will receive and/or enable your payment of the applicable Charges for services or goods obtained through your use of the Services."), https://www.uber.com/legal/terms/us.

II. THE RULE APPLIED BELOW INVITES ABUSIVE ASSET-FORFEITURE PRACTICES

In recent years, NMA and its members have become increasing concerned that civil asset forfeiture is not being used fairly or in a manner consistent with constitutional principles. Because the rule applied below creates a bright-line rule that unauthorized drivers of borrowed rental cars lack Fourth Amendment rights to challenge searches of those vehicles after a lawful traffic stop, it "invite[s] police officers to stop" rental cars "regardless of probable cause or reasonable suspicion of anything illegal." *Brendlin v. California*, 551 U.S. 249, 263 (2007). "The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible . . . would be a powerful incentive to run . . . 'roving patrols.'" *Id.*

Those incentives are magnified by current civil asset forfeiture policies, which generally permit law enforcement to share in the proceeds of assets seized. By creating a category of motorists that law-enforcement officers can identify as subject to lesser Fourth Amendment protection, the rule applied below encourages officers to conduct highway interdictions designed to seize assets.

A. Law-Enforcement Officers in Jurisdictions Subject to the Rule Applied Below Are Especially Likely To Detain Rental Cars

The facts of this case illustrate that law-enforcement officers in jurisdictions governed by the rule applied below may see the fact that a vehicle is a rental car as a reason to pull it over.

The arresting officer testified that he had identified petitioner's vehicle as a rental car. JA62-63 ("I observed a gray rental vehicle pass my location."). After pulling petitioner over – for driving in the left

lane without passing[15] – and requesting his identification, the officer asked whether the vehicle was petitioner's. JA37. When petitioner replied that it was a rental car, the officer asked to see the rental agreement. *Id.* After running a criminal-history check, the officer reviewed the rental agreement to determine whether petitioner was named on it (which he was not). JA38.

After asking petitioner to exit the vehicle, the officer apparently sought to use the fact that he was not named in the rental agreement to convince petitioner to consent to a search of the car. JA48 ("I may have actually explained to him that I didn't need his consent because he's an unauthorized driver of the vehicle."). When petitioner declined to consent, the officer proceeded to search both the passenger compartment and the trunk of the automobile. JA39-40, 162. The officer testified that at that point he understood that he was authorized to conduct a search because the rental agreement "says no other driver permitted and it was a current contract." JA48.

Those actions were not accidental: rather, they reflected precisely the type of procedure that the Third Circuit's rule encourages. *See* JA45.

B. Civil Asset Forfeiture Gives Law Enforcement Financial Incentives To Stop and To Search Vehicles

Civil asset forfeiture is a common and growing practice used frequently against motorists.[16] State and

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[15] *See* 75 Pa. Cons. Stat. § 3313(d)(1)(i)-(ii).

[16] *See, e.g.*, Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, Wash. Post (Sept. 6, 2014) (describing use of civil forfeiture against motorists), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/

federal civil forfeiture laws permit law-enforcement officers to seize property without prior judicial process if there is probable cause to believe that the property is connected to a crime. *See, e.g.*, 18 U.S.C. § 981(b) (authorizing seizure without a warrant of property subject to forfeiture when the seizure is made pursuant to a lawful arrest or search).

In most cases, state or federal law allows law-enforcement agencies to share in the proceeds of asset forfeiture and to use that revenue for unrelated purposes, providing an incentive for increasing use of the practice. *See Policing for Profit*, *supra* note 16, at 14; *see also Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting the denial of certiorari) ("[B]ecause the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture."). Those incentives have fueled the practice's growth to such an extent that, in 2014, assets seized by federal law-enforcement agencies were more valuable than assets stolen in reported burglaries.[17]

A recent investigative report found that, from September 2001 to September 2014, law-enforcement officials conducted 61,998 warrantless cash seizures through the Department of Justice's Equitable

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?utm_term=.681c254afa16; Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson & Jennifer McDonald, Inst. for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. Nov. 2015) ("*Policing for Profit*") (describing the practice generally), http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

[17] *See* Christopher Ingraham, Wonkblog, *Law Enforcement Took More Stuff From People Than Burglars Did Last Year*, Wash. Post (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/.

Sharing Program, which authorizes sharing federal forfeiture proceeds with cooperating state and local law-enforcement agencies. *See Stop and Seize*, *supra* note 16. Of the $2.5 billion in proceeds from those seizures, $1.7 billion was shared with state and local law-enforcement agencies, with much of it being used to pay salaries or other operating expenses. *See id.*

In many cases, police discover the assets to be seized during a search of a vehicle; accordingly, a significant portion of the "egregious and well-chronicled abuses" caused by this system have fallen on motorists. *Leonard*, 137 S. Ct. at 848 (Thomas, J., statement respecting the denial of certiorari) (collecting such examples); *see also Stop and Seize*, *supra* note 16 (noting "the role of the federal government and the private police trainers in encouraging officers to target cash on the nation's highways").

For example, it has been reported that police in Tenaha, Texas, employ a practice of stopping out-of-town drivers for minor infractions, seizing the property in their automobiles, and exchanging their freedom for a waiver of any right to challenge the forfeiture.[18] One motorist allegedly was stopped after driving in the left lane for more than half a mile without passing (the same traffic infraction for which petitioner was stopped, JA36-37, 65) before he and a companion were threatened with charges of money laundering and child endangerment if they did not agree to forfeit cash that was found during a search of his car. *See* Stillman, *supra* note 18.

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[18] *See* Sarah Stillman, *Taken*, The New Yorker (Aug. 12 & 19, 2013), https://www.newyorker.com/magazine/2013/08/12/taken; *Leonard*, 137 S. Ct. at 848 (Thomas, J., statement respecting the denial of certiorari) (noting this example).

One investigation into civil asset forfeiture practices found a common pattern that is echoed in the present case: "In case after case, highway interdictors appeared to follow a similar script." *Stop and Seize*, *supra* note 16. "Police set up what amounted to rolling checkpoints on busy highways and pulled over motorists for minor violations, such as following too closely or improper signaling." *Id.*; *cf.* JA36-37 (explaining that petitioner was pulled over for driving in the left lane). "They quickly issued warnings or tickets." *Stop and Seize*, *supra* note 16; *cf.* JA45 ("Q. And issue him a traffic citation for driving in the left lane? A. A warning."). "They studied drivers for signs of nervousness, including pulsing carotid arteries, clenched jaws and perspiration." *Stop and Seize*, *supra* note 16; *cf.* JA68 ("The first thing I observed was extreme nervousness from the operator."). "They also looked for supposed 'indicators' of criminal activity, which can include such things as trash on the floor of a vehicle, abundant energy drinks or air fresheners hanging from rearview mirrors." *Stop and Seize*, *supra* note 16; *cf.* JA70 (noting that Byrd "picked up a sweatshirt that was on the passenger floor").

The burdens of such routinized use of civil asset forfeiture fall disproportionately on the "poor and other groups least able to defend their interests in forfeiture proceedings." *Leonard*, 137 S. Ct. at 848 (Thomas, J., statement respecting the denial of certiorari). And, because those same people are more likely to use cash over other forms of payment, they are more likely to carry assets worth seizing. *See id.* The poor are also least able to afford the cost and logistical

burdens associated with challenging a seizure, which can be significant. *See id.*[19]

Abuse of civil asset forfeiture has led to criticism even from the law-enforcement agencies whose budgets rely on it. Earlier this year, the Department of Justice's Office of the Inspector General issued a report faulting the Department's use of civil asset forfeiture for lack of oversight and questionable investigative effectiveness.[20] That report found that asset seizures resulting from "interdiction operations" – i.e., traffic stops and searches at mass transportation hubs or parcel distribution centers – were particularly unlikely to be related to new or ongoing investigations or lead to arrests and prosecutions. OIG Report at iii. Despite the concerns expressed in the OIG Report, in July the Department of Justice issued a new order that superseded prior restrictions on federal "adoption" of seizures by state and local law enforcement and authorized expanded use of civil asset forfeiture. *See* Office of the Att'y Gen., Order No. 3946-2017 (July 19, 2017), https://www.justice.gov/file/982611/download.

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[19] Under current law in Illinois, in order to challenge the seizure of assets, property owners must pay a bond equal to the greater of $100 or 10% of the property's value. *See* 725 Ill. Comp. Stat. 150/6(C)(2); *Policing for Profit*, *supra* note 16, at 12. If unsuccessful, property owners not only lose the value of the bond, but also must pay the full cost of the forfeiture proceeding. *See* 725 Ill. Comp. Stat. 150/6(C)(2); *Policing for Profit*, *supra* note 16, at 12. And, even if they win, they nevertheless must pay 10% of the cost of the bond. *See* 725 Ill. Comp. Stat. 150/6(C)(3); *Policing for Profit*, *supra* note 16, at 12.

[20] *See* U.S. Dep't of Justice, Office of the Inspector General, Evaluation & Inspections Div. 17-02, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities* (Mar. 2017) ("OIG Report"), https://oig.justice.gov/reports/2017/e1702.pdf.

C. The Rule Applied Below Magnifies Incentives Created by Civil Asset Forfeiture

The incentives created by the rule applied below make it uniquely prone to abuse. Unlike limitations on the applicability of the Fourth Amendment that rely on an officer's subjective good faith, the rule below turns solely on contractual terms that law-enforcement officers can review before determining whether to conduct an unreasonable search.

The arresting officer in this case was able to identify petitioner's vehicle as a rental car, even as it drove past him at highway speed. JA63. And, after he pulled the car over, the rental agreement made it easy for the officer to determine that petitioner was not an authorized driver. JA68 ("[I]t says no other driver permitted and it was a current contract.").

Although no forfeiture is at issue, this case nevertheless illustrates how a combination of (1) standard rental agreements with strict authorized-driver policies; (2) a rule that restricts the Fourth Amendment rights of unauthorized drivers of rental cars; and (3) financial incentives for law-enforcement agencies to maximize the value of assets they seize and forfeit creates dangerous incentive for law enforcement to detect, stop, and search rental cars once they have determined that the driver is unauthorized.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 16-1371

In The Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(c) (AM. LAW INST. 1981) 18

Sonari Glinton, *Rental Firms' Disaster Readiness May Help Usher the Age of Self-Driving Cars*, NPR, Sept. 25, 2017, https://n.pr/2yon4OG 7

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

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[1] This *amicus curiae* brief is filed with the written consent of all parties in this case. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Hernandez v. Mesa*, No. 15-118 (U.S. filed Dec. 9, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. filed May 7, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganias, *United States v. Ganias*, No. 12-240-cr (2d Cir. filed July 29, 2015) (en banc).

SUMMARY OF THE ARGUMENT

The Court should reject the Third Circuit's sweeping holding in this case that "the sole occupant of a rental vehicle has [no] Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement." *United States v. Byrd*, 679 F. App'x 146, 150 (3d Cir. 2017).

This holding is wrong for two main reasons.

First, the Third Circuit's bright-line rule rests on the false premise that it is a breach of contract for anyone not listed on a rental car agreement to operate or even occupy a rental car. In reality, many individuals who are not named in a rental car agreement are nevertheless authorized to drive the rental car either as a matter of state law or under the policy of the rental-car agency.

As such, requiring police officers to make substantive Fourth Amendment judgments based on a rental car agreement is an unworkable rule prone to constitutional error. That error will then fall disproportionately on minority communities who account for an outsized share of the rental-car market. Moreover, this error-prone rule will make life harder for the residents of disaster-ravaged regions like Puerto Rico, Florida, and Texas, where the destruction of countless private vehicles has left many residents entirely dependent on rental cars as their primary means of transportation.

Second, beyond the facts of this case, the Third Circuit's fundamental assumption that contracts can determine Fourth Amendment rights makes no sense. Contracts are negotiated for private, economic purposes, and are based on limited forms of consent to keep the wheels of commerce moving. The parties to a contract have no reason to expect that what they are agreeing to as between themselves alone might affect their rights as against the government. This is especially true of adhesion contracts, which make up the bulk of contracts entered into by a vast majority of Americans in order to secure the necessities of modern life.

The way out of this morass is a return to the core principle of reasonableness that has guided this Court's Fourth Amendment jurisprudence for over two centuries. It then becomes clear that only breaches of public laws—and not breaches of contract—should serve to impair a person's Fourth Amendment rights. This is because a legal violation affects the relationship between an individual and the government, while a contract violation merely affects the position of two or more private parties. Consequently, only a breach of law is germane to the question of whether it is reasonable for an individual to expect to be free from governmental intrusion.

ARGUMENT

I. Allowing private contracts to dictate Fourth Amendment rights is a recipe for chaos.

A. A contract-based approach to Fourth Amendment rights cannot be readily administered by the police.

This Court has recognized on numerous occasions that any Fourth Amendment standard must be "workable for application by rank-and-file, trained police officers." *Illinois v. Andreas*, 463 U.S. 765, 772 (1983). "A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

Using contract terms to determine whether an individual has a reasonable expectation of privacy does not yield such a workable standard. This is due to a myriad of variations among contracts and state laws governing contracts. The present case is a perfect example. The Third Circuit held that a "sole occupant" of a rental vehicle lacks an expectation of privacy if that person is not named in the rental agreement. *See Byrd*, 679 F. App'x at 150. This tracks the Third Circuit's analysis in *United States v. Kennedy*, which holds that a driver "who is not listed on the rental agreement as an authorized driver lacks a legitimate expectation of privacy in the car." 638 F.3d 159, 165 (3d Cir. 2011). In both cases, the Third Circuit conflated "unauthorized

drivers" with drivers who are "not listed on the rental agreement as an authorized driver." *Id.*

Major rental car agencies like Hertz and Thrifty, construe their rental agreements differently. These agencies have declared that every employee of a company that has a corporate account with them may drive their rental cars, regardless of whether each employee is named on a given rental car agreement.[3] By contrast, Enterprise—the nation's largest car rental car company—has no similar provision in its corporate rental policies.[4]

Now consider that in eight states—California, Iowa, New York, Wisconsin, Missouri, Illinois, Nevada, and Oregon—a renter's spouse is deemed by law to be an authorized driver of a rental car, regardless of whether the spouse happens to be named in the rental car agreement. *See* Cal. Civ. Code § 1939.01(e)(2) (2017); Iowa Code § 516D.3(1)(c) (2017); N.Y. Gen. Bus. Law § 396-z(1)(a)(ii) (2017); Wis. Stat. § 344.57(2)(a) (2017); Mo. Ann. Stat. § 407.730(2)(b) (2017); 625 Ill. Comp. Stat. 27/10 (2017); Nev. Rev. Stat. § 482.31515(2) (2017); Or. Rev. Stat. § 646A.140(1)(b) (2017); *cf.* Mass. Gen. Laws ch. 90, § 32E½ (2017).

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[3] *See Hertz Rental Qualification & Requirements*, HERTZ, http://bit.ly/2z2HzoG (last visited Nov. 15, 2017); *General Policies*, THRIFTY, http://bit.ly/1StJpQ0 (last visited Nov. 15, 2017); *cf.* Cal. Civ. Code § 1939.01(e)(3) (2017) (making employers and employees of the renter authorized drivers by law).

[4] *See Additional Driver Policies*, ENTERPRISE, http://bit.ly/2iuWQDI (last visited Nov. 15, 2017); *see also* 2016 U.S. CAR RENTAL MARKET, AUTO RENTAL NEWS (2016), http://bit.ly/2srAc3K (last visited Nov. 15, 2017).

This contractual and statutory morass leaves no administrable standard that police officers in the field can readily employ to know with precision who is authorized to drive a rental car and who is not. The fact that rental cars are frequently operated across state lines raises further complications, since the law governing a rental car agreement is the law of the state where the car is rented. The end result is that, to the extent the police rely on the Third Circuit's rule that a driver "not named in the rental agreement" has no expectation of privacy in the vehicle, 678 F. App'x at 150, the police are bound to violate the Fourth Amendment rights of countless drivers who are in fact authorized drivers under governing state law or a rental-car-agency policy. *Cf. Virginia v. Moore*, 553 U.S. 164 (2008). These aggrieved drivers are then likely to have little or no recourse for the violation of their constitutional rights given the qualified-immunity doctrine, which immunizes police violations of constitutional rights that are not clearly established. *See White v. Pauly*, 137 S. Ct. 548, 551 (2017).

By contrast, the Fourth Amendment's general rule of reasonableness for all searches and seizures affords police officers a "single, familiar standard" to determine Fourth Amendment rights in dealing with rental cars. *Dunaway*, 442 U.S. at 213–14. Such a requirement would also be a relief to the tens of millions of Americans who get behind the wheel of a rental car every year.

B. A contract-based approach to Fourth Amendment rights will inordinately prejudice the rights of minorities.

Minority communities in America account for a disproportionate share of the car rental market.[5] If the police may search any rental vehicle whose driver is not listed on the rental contract, this will incentivize unwarranted police stops and searches of a class of vehicles more likely to be driven by minorities. At the same time, this constitutional rule will strip the affected drivers of the standing they need to challenge this unwarranted police conduct.[6]

These harms are bound to be especially acute in the wake of natural disasters like hurricanes. Usage rates for rental cars skyrocket following such disasters given the massive damage that these disasters inflict upon private vehicles and public transit services.[7] Hurricane Harvey, for example, is estimated to have destroyed "as many as a million cars in the Houston

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[5] *See* KEVIN NEELS, THE BRATTLE GROUP, EFFECTS OF DISCRIMINATORY EXCISE TAXES ON CAR RENTALS: IMPACTS ON MINORITIES, LOW INCOME HOUSEHOLDS, INSURANCE COSTS, & AUTO PURCHASES 1–7 (2009).

[6] *See* Lisa J. Zigtermann, *Live & Let Drive: The Struggle for Unauthorized Drivers of Rental Cars in Attaining Standing*, 2009 U. ILL. L. REV. 1655, 1674 (2009).

[7] *See* Sonari Glinton, *Rental Firms' Disaster Readiness May Help Usher the Age of Self-Driving Cars*, NPR, Sept. 25, 2017, https://n.pr/2yon4OG (rental car companies have proactively redistributed the 2.2 million vehicles in the U.S. rental fleet to cope with increased demand after natural disasters).

metro area."[8] The consequences of this reality for disaster victims are staggering. "Reliable transportation is a daily, fundamental need, almost more so in the wake of a disaster."[9] *Cf. Krimstock v. Kelly*, 306 F.3d 40, 44 (2d Cir. 2002) (Sotomayor, J.) ("A car or truck is often central to a person's livelihood or daily activities.").

Affirming the Third Circuit's decision in this case would thus mean that anyone who briefly borrows a rental car from the contracting renter in hurricane-ravaged Houston or San Juan must be ready to sacrifice their Fourth Amendment rights to get where they need to go. That outcome is inconsistent with the vision of the Framers, who rejected "indiscriminate searches and seizures conducted under the authority of general warrants." *Payton v. New York*, 445 U.S. 573, 583 (1980) (punctuation omitted). That outcome is also inconsistent with the conscience of our free nation—one that is more than prepared to recognize that the borrower of a rental car has a reasonable expectation of privacy in the car even if his or her name is not on the rental car agreement.

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[8] Alex Davies, *[Hurricane] Harvey Wrecks Up to a Million Cars in Car-Dependent Houston*, WIRED, Sept. 3, 2017, http://bit.ly/2iTaCmZ.

[9] *Id.*

C. A contract-based approach to Fourth Amendment rights opens a Pandora's box of digital privacy problems.

If contract provisions are relevant to Fourth Amendment analysis, then this will have a profound impact on digital privacy. This may be seen in recent cases involving cloud service providers (CSPs). Nearly all CSPs include consent-to-search provisions in their terms of service. Through these provisions, CSPs retain the right to search a user's data at all times notwithstanding the fact that most users have never read these provisions. Federal district courts have since reached very different conclusions about the Fourth Amendment rights of similarly-situated criminal defendants based on these consent-to-search provisions.

In *United States v. DiTomasso*, a federal district court held that an individual does not waive their Fourth Amendment rights merely by agreeing to a consent-to-search term in an adhesion contract. 56 F. Supp. 3d 584, 592 (S.D.N.Y. 2014). The defendant created accounts with Omegle, a chat service, and AOL, an email service. *Id.* at 596. The defendant agreed to adhesion contracts that allowed Omegle to search his chats and AOL to search his emails. *Id.* The court held that the defendant *did not* vitiate his reasonable expectation of privacy under Omegle's Terms of Service. *Id.* at 579. But the court then found that the defendant *did* vitiate his reasonable expectation of privacy under AOL's Terms of Service, because these terms contemplated AOL as a government agent. *Id.*

In *United States v. Stratton*, a federal district court held that a defendant had a reduced expectation of privacy in an online account due to boilerplate contract terms. 229 F. Supp. 3d 1230, 1242 (D. Kan. 2017). The court reached this conclusion despite the fact that the defendant had no opportunity to negotiate the contract; in fact, he testified that he had not even read it. *See id.* This is unsurprising given the contract's length at 6,086 words.[10] In short, by merely clicking a box, the defendant lost his expectation of privacy.

Adhesion contracts like the ones at issue in *DiTomasso* and *Stratton* are commonplace. Dropbox and Apple's iCloud, two popular file-hosting services, both have Terms of Service retaining each company's right to examine user files for compliance with their Acceptable Use Policy.[11] Many popular dating apps, such as Tinder, also have these provisions.[12]

These examples accordingly illuminate the high stakes of this case. If a rental car agreement can dictate the extent of a person's Fourth Amendment rights, a CSP adhesion contract may well do the same. And if that is true, then a vast trove of private data will no longer be protected from government intrusion under

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[10] *See Playstation Network Terms of Service & User Agreement, Version 3.0*, PLAYSTATION (SONY), July 15, 2008, http://bit.ly/2zLXYv2.

[11] *See Dropbox Terms of Service*, DROPBOX, Feb. 10, 2017, http://bit.ly/1r1LYHN; *Apple iCloud Terms & Conditions*, APPLE, Sept. 19, 2017, http://apple.co/2jqRfT3.

[12] *See Tinder Terms of Use*, TINDER, Oct. 26, 2017, http://tinde.rs/1BFSEEc.

the Fourth Amendment. That state of affairs should give the Court pause, if only because "the Cyber Age is a revolution of historic proportions, [and] we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). The future of this digital revolution depends not only on the protection of free speech but also on the protection of individual privacy—and that value cannot be preserved if a person's Fourth Amendment rights can evaporate based on a consent-to-search provision in a CSP adhesion contract that one may never have read.

II. Private contracts should not be used to delineate Fourth Amendment rights.

A. Private parties use contracts to order their rights as against each other—not as against the government.

Private parties enter into contracts for the purpose of ordering their relationships with each other—not with the government. The specific terms of a contract between private parties thus are not fit to gauge an individual's reasonable expectation of privacy *as against the government*. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (explaining that the Framers "conferred, as against the government, the right to be let alone").

The quintessential purpose of a contract is to enable private parties to order their economic rights by

allocating risks and costs while making their mutual expectations binding on each other. *See* 1 WILLISTON ON CONTRACTS § 1:1 (4th ed. 2017). The parties have no reason to expect that their private contract terms may also entail a waiver of their Fourth Amendment rights when the police wish to conduct a search. After all, the government is not a party to the contract. It makes no sense, then, to allow private contract terms to control an individual's Fourth Amendment rights in whatever she has contracted for, be it a rental car, a hotel room, a storage locker, or cloud data storage. The prevalence of adhesion contracts in every aspect of modern life only furthers this point.

In *Jones v. United States*, this Court cautioned against allowing Fourth Amendment rights to turn on arcane distinctions in property law. 362 U.S. 257, 266 (1960); *see also Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("[A]rcane distinctions developed in property and tort law . . . ought not to control."). Fourth Amendment rights likewise should not turn on arcane distinctions in contract law. Of course, contract terms might shed some light on *the parties'* expectations of privacy *as against each other*. But they cannot control what is reasonable from a societal perspective under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

To put this in concrete terms, consider a hotel guest's "implied or express permission" for "maids, janitors, or repairmen to enter his room in performance of their duties." *Stoner v. California*, 376 U.S. 483, 489 (1964). This grant of permission does not waive the

guest's right to keep his door shut when the police come knocking. *See id.* The same goes for a person's contracts with housekeepers, dog walkers, valets, computer technicians, or anyone else. All of these private arrangements simply have no bearing on how the guest—or anyone else—expects to be treated by the government.

B. Consent to a private contract may be found based on conditions that fall well short of those needed to waive Fourth Amendment rights.

In *Florida v. Jimeno*, this Court held that the "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness." 500 U.S. 248, 251 (1991). There is nothing objectively reasonable about concluding that an individual has consented to a police search when the purported evidence of consent is a purely private contractual arrangement and, in many cases, a plain contract of adhesion.

Indeed, the common law establishes that consent to a contract may be based on a variety of mere legal fictions. An individual may consent to a contract by a change in conduct, *see Galloway v. Santander USA, Inc.*, 819 F.3d 79, 87 (4th Cir. 2016), inaction, *see Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012), and even silence, *see* RESTATEMENT (SECOND) OF CONTRACTS § 19 (AM. LAW INST. 1981).

Courts have also upheld the enforceability of "clickwrap" contracts formed over the internet, in which a user clicks a box agreeing to dozens of pages of terms and conditions that they manifestly have not read. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 238–39 (2d Cir. 2016). Such abbreviated forms of consent may keep the wheels of commerce turning, but they cannot deprive individuals of Fourth Amendment rights meant to protect them from the government (not Amazon).

Of course, in the civil context, constitutional rights may be waived through a contract. *E.g.*, *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (parties may by contract waive their right to notice of litigation). But in the criminal context, the bar for waiver is much higher: "[w]aiver of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

The Court has applied this more demanding standard to: (1) waiving one's right to a trial, *see id.*; (2) waiving one's right to be present at trial, *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970); (3) waiving one's rights to remain silent and to the presence of an attorney, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); and (4) waiving one's right to counsel in a criminal case, *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). It would contravene *Brady* and its progeny to conclude that private contract terms—i.e., terms meant to order private

economic relationships—could waive or decide one's Fourth Amendment rights against the government.

C. Adhesion contracts are particularly ill-suited to delineating Fourth Amendment rights.

As noted above, adhesion contracts put front and center many of the biggest problems with allowing contract terms to dictate Fourth Amendment rights. To this end, it bears repeating that most of the contracts that we all deal with on a day-to-day basis are adhesion contracts. Public utilities, banks, and cellular providers all use "standard-form contract[s]" that they prepare "to be signed by the party in [the] weaker position, usually a consumer, who adheres to the contract with little choice about the terms." *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 235 (3d Cir. 2012).

State-level variation in enforcing adhesion contracts, in turn, indicates the substantial likelihood for chaos if Fourth Amendment rights are tethered to contract provisions. In Pennsylvania, "contracts of adhesion are *per se* procedurally unconscionable."[13] *Antkowiak v. TaxMasters*, 455 F. App'x 156, 160 (3d Cir. 2011). The same is true in New Mexico, Nevada,

[13] Courts have reached this conclusion because of the "lack of meaningful choice" that adhesion contracts entail. *Quilloin*, 673 F.3d at 235. Just so. Adhesion contracts do not embody any kind of "haggle or cooperative process"; they are more akin to "a fly and flypaper." Arthur Alan Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131, 143 (1970).

California, Tennessee, and Ohio.[14] As a result, if contract enforcement and Fourth Amendment rights go hand in hand, the same rental car agreement[15] may vitiate an unauthorized driver's Fourth Amendment rights in all those states where adhesion contracts are enforceable, but not in states like Pennsylvania, where adhesion contracts are *per se* unconscionable. *See Antkowiak*, 455 F. App'x at 159–60.

III. A path forward.

A. Public laws, not private contracts, should control analysis of Fourth Amendment rights.

Laws govern an individual's relationship with the government while contracts govern the private interactions of individuals with each other. *See* 1 CORBIN ON CONTRACTS § 1.1 (2017). Violating a law affects a person's relationship with the government and may

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[14] *See THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 532 F. App'x 813, 818 (10th Cir. 2013); *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2002); *Guerra v. Hertz Corp.*, 504 F. Supp. 2d 1014, 1021 (D. Nev. 2007); *Berent v. CMH Homes Inc.*, 466 S.W.3d 740, 754–55 (Tenn. 2015); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 872 (Ohio 1998).

[15] Courts have generally held that rental car contracts are adhesion contracts. *See, e.g., Phila. Indem. Ins. Co. v. Barerra*, 21 P.3d 395, 404 (Ariz. 2001); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 266 (Ill. 2006); *Budget Rent-A-Car Sys., Inc. v. State Farm Mut. Auto Ins. Co.*, 727 So.2d 287, 291 (Fla. 2d Dist. App. 1999). Some courts have noted, though, that there may be certain provisions within rental car contracts that are not adhesive. *See Budget Rent-A-Car Sys., Inc. v. Crawford*, 185 F.3d 866 (9th Cir. 1999) (table decision).

therefore compromise a person's reasonable expectation of privacy under certain circumstances. Violating a contract, on the other hand, is rarely a breach of law. The two are analytically distinct, and a breach of contract is insufficient on its own to abrogate Fourth Amendment rights. *See United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001) (an unauthorized driver of a rental car had a reasonable expectation of privacy in the vehicle because "it was not *illegal* for [the defendant] to possess or drive the vehicle, it was simply a breach of contract with the rental company").

A breach of contract may sometimes overlap with a breach of law. For example, a renter who never returns his rental car is both breaching his contract with the rental company and stealing the car. Only the theft, however—not the contract breach—vitiates the renter's reasonable expectation of privacy in the car. *Cf. United States v. Lyle*, 856 F.3d 191, 201 (2d Cir. 2017) (holding that an unauthorized driver of a rental car lacked a reasonable expectation of privacy in the car because his driver's license was suspended and thus he could not lawfully possess the car).

This makes sense. The purpose of the Fourth Amendment is to regulate the government's conduct when investigating suspected breaches of the law, as opposed to breaches of contract. Therefore, unless the violation of private contract terms gives rise to conduct that violates the law, a mere breach of contract should not in itself determine the presence or absence of a reasonable expectation of privacy.

B. Any contract-based analysis of Fourth Amendment rights should steer clear of non-parties to a contract.

Assuming *arguendo* that a contract may determine a person's Fourth Amendment rights, it does not then follow that contracts may also decide the Fourth Amendment rights of persons who are not a party to the contract. The rental-car context demonstrates why. The renter of a car cannot assign their contractual right to drive the car to a third party. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(c) (AM. LAW. INST. 1981). Hence, when a renter lends that car to someone not authorized to drive it, the renter's possible breach of contract should not be said to impair the Fourth Amendment rights of the unauthorized driver who, by definition, is a non-party to the rental agreement.

The Ninth Circuit's decision in *United States v. Thomas* cements this point: "[W]e cannot base constitutional standing entirely on a rental agreement to which *the unauthorized party was not a party* and *may not capture the nature of the unauthorized driver's use of the car*." 447 F.3d 1191, 1199 (9th Cir. 2006) (emphasis added). The Eighth Circuit has reached the same conclusion, finding that an unauthorized driver may have a reasonable expectation of privacy in a rental vehicle given his relationship with the renter—and regardless of the absence of the unauthorized driver's name on the rental agreement. *See United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998).

In the end, the touchstone of the Fourth Amendment is *reasonableness*. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). There are many factors that may be germane in deciding whether an individual possesses a reasonable expectation of privacy in a place or a vehicle. This is because society recognizes that reasonable expectations of privacy may emerge in a multitude of different ways—it is not just a matter of contract law. *Compare Minnesota v. Carter*, 525 U.S. 83, 90 (1998) (guest on premises for commercial purposes has no legitimate expectation of privacy), *with Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (overnight guest has legitimate expectation of privacy); *see also Rakas*, 439 U.S. at 152–53. That means in cases like this one, reasonableness—and not the terms of a car rental agreement—should be the final measure for determining a person's Fourth Amendment rights.

CONCLUSION

The Court should reject the Third Circuit's bright-line rule that contractually-unauthorized drivers of rental cars have no reasonable expectation of privacy in these vehicles. "This is not an area of the law in which any 'bright line' rule would safeguard both Fourth Amendment rights and the public interest in a fair and effective criminal justice system." *Rakas v. Illinois*, 439 U.S. 128, 155–56 (1978) (Powell, J., concurring). Instead, as always, the Fourth

Amendment's general command of reasonableness should prevail.

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No. 16-1371

In The Supreme Court of the United States

TERRENCE BYRD, PETITIONER,
v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF SOUTHWESTERN LAW STUDENT LINDSEY N. URSUA, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a driver has a reasonable expectation of privacy in a rental car when the driver has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence and Constitutional Criminal Procedure and has authored numerous publications on both Evidence and Criminal law. Michael M. Epstein is a professor of law and Director of the pro bono Amicus Project at Southwestern Law School. Amicus Lindsey N. Ursua is an upper-division J.D. candidate at Southwestern Law School with extensive academic and professional interest in Criminal Law and Procedure.

Amici have neither interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation people's constitutional right to privacy.

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For the past fifty years, the Court's precedents compel the conclusion that an unauthorized driver does have the capacity to assert Fourth Amendment protection. In order to maintain consistency in the Court's jurisprudence, this Court must find that a driver has a reasonable expectation of privacy in a rental vehicle even if he or she is not listed on the rental agreement.

Looking at the Court's jurisprudence, three reasons support the conclusion that an unauthorized driver has a reasonable expectation of privacy in a rental vehicle. First, the Court has long established that legal property rights are not a prerequisite for asserting Fourth Amendment protection. Rather, an individual may have the capacity to assert Fourth Amendment protection if the individual has an "interest that is recognized and permitted by society." An unauthorized driver has such interest because the driver is like an overnight guest in that the driver possesses the vehicle, has some measure of control over it, has the ability to exclude others except for the rental company and the authorized renter, and the unauthorized driver shares in the expectation of privacy of the authorized renter. Second, automobiles are vital to society. Third, the Court has recognized that an individual does not shed his or her constitutional right to privacy merely because the individual steps into an automobile.

The Court must not allow the people's constitutional rights to hinge on contractual agreements. The result would be to relegate Fourth Amendment jurisprudence to a subcategory of contract law which is contrary to what the founders intended in adopting the Fourth Amendment.

This Court must not permit such a result for four reasons. First, a bright line rule that automatically precludes an unauthorized driver from asserting Fourth Amendment protection conflicts with the Court's interpretation of what would constitute being "wrongfully on the premises." Moreover, if the Court reasons that an unauthorized driver's presence in the rental vehicle is wrongful, the Court would be equating civil liability with criminal liability. Second, courts have recognized that a breach of contract does not necessarily affect the rights of a third party. Thus, in such situations, the third party has a reasonable expectation of privacy. Third, such a bright line rule would contradict the Court's policy for Fourth Amendment violations because it would create rather than remove incentives for police officers to disregard the Constitution. Lastly, such a rule would lead to absurd results because the rule conflicts with what "society is prepared to accept as reasonable" and it would allow courts to arbitrarily allow an authorized driver who breaches the rental agreement, thereby becoming unauthorized, to assert Fourth Amendment protection while denying an unauthorized driver the same ability.

This Court should reverse the Third Circuit's decision. A finding that Mr. Byrd has a reasonable expectation of privacy in the rental vehicle even though he is not listed on the rental agreement maintains consistency in the Court's jurisprudence.

ARGUMENT

I. AN UNAUTHORIZED DRIVER HAS A REASONABLE EXPECTATION OF PRIVACY IN A RENTAL VEHICLE WHEN THE DRIVER HAS PERMISSION FROM THE AUTHORIZED RENTER TO OPERATE THE VEHICLE.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. The purpose of the Fourth Amendment is to "impose a standard of 'reasonableness' upon exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard privacy and security of individuals against arbitrary invasion.'" *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)).

Although the right to challenge a search on Fourth Amendment grounds historically has been referred to as "standing," the Court has opined that the concept is "more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas v. Illinois*,

439 U.S. 128, 140 (1978). "Fourth Amendment rights are personal rights which, like other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). The ability to assert Fourth Amendment protection does not depend on property rights but upon whether the individual claiming protection has a "legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143 (quoting *Katz v. United States*, 389 U.S. 347, 353 (1967)). More specifically, the individual must have both a subjective expectation of privacy in the invaded place and a reasonable expectation of privacy. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

This Court should not preclude Mr. Byrd from challenging the violation of his Fourth Amendment rights because he had a personal reasonable expectation of privacy in the rental vehicle even though he was not listed on the rental agreement. An unauthorized driver is similar to an overnight guest because the driver possesses the vehicle, has some measure of control over it, and shares in the expectation of privacy of the authorized renter. Privacy in a rental vehicle would certainly fall within the realm of expectations that society would recognize as reasonable because automobiles are essential to society. Moreover, an unauthorized driver does not shed his or her constitutional right to privacy merely because the driver steps into an automobile. Accordingly, this Court should find that an unauthorized driver has a personal reasonable

expectation of privacy in a rental vehicle. Thus, Mr. Byrd may claim Fourth Amendment protection.

A. An Unauthorized Driver Is Similar To An Overnight Guest.

The Third, Fourth, Fifth, and Tenth Circuit's reasoning that a person's reasonable expectation of privacy hinges on whether he or she has a legal property or possessory interest[2] directly contradicts the Court's well-established jurisprudence. The Court's jurisprudence supports the proposition that an unauthorized driver, like an overnight guest, has a personal legitimate expectation of privacy even though the unauthorized driver may not have a legal property right or possessory interest in the vehicle. An examination of *Rakas* and its progeny demonstrate that legal property rights or possessory interest is a mere factor and not a condition for a personal reasonable expectation of privacy. Moreover, even when property rights are considered, legal ownership of the property is not a prerequisite to the capacity to assert Fourth Amendment protection.

In *Rakas*, the Court reaffirmed the view adopted in *Jones v. United States* that "arcane distinctions developed in property law ought not to

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[2] *See United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011); *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *United States v. Roper*, 918 F.2d 885 (10th Cir. 1990); *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990).

control" the protection of the Fourth Amendment. *Rakas*, 439 U.S. at 143. The Court has held that while a personal reasonable expectation of privacy must have a source "outside of the Fourth Amendment," such expectation of privacy may be shown "either by reference to concepts of real or personal property law or to understandings or an interest that is recognized and permitted by society." *Carter*, 525 U.S. at 88 (quoting *Rakas*, 439 U.S. at 143 n.12).

The Court has emphasized the importance of "the everyday expectations of privacy that we all share" in defining reasonableness for the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). The Court in *Rakas* relied more heavily on informal social concepts of "dominion," "control," and the right to exclude. *Rakas*, 439 U.S. at 148-49. Thus, the Court distinguished *Rakas*, where the passengers had no property or possessory interest in the vehicle, from cases involving possessory interests founded on understandings "recognized and permitted by society." *Rakas*, 439 U.S. at 143-49, n.12. The Court restated that people in public phone booths and social guests have no legal interest in the place searched, which they "neither ow[n] nor leas[e]," but those people have a reasonable expectation of privacy because they control the premises and can "exclude all others" except for the owner. *Rakas*, 439 U.S. 140-49 (citing *Katz*, 389 U.S. at 352; *Jones v. United States*, 362 U.S. 257 (1960)). Therefore, even if a defendant may not have a legal property or possessory interest in a place searched, he or she

may have an interest that is "recognized and permitted by society," which would create a legitimate expectation of privacy. *See Rakas*, 439 U.S. at 143.

In *Jones*, the Court rejected the government's argument that the defendant could not claim Fourth Amendment protection because he had "neither ownership of the seized articles nor an interest in the apartment greater than that of an 'invitee or guest.'" *Jones*, 362 U.S. at 259. The Court stated that the government's approach would draw distinctions among different types of possessors. *Id.* at 265. Possessors who are classified as a "guest" or "invitee" would have "too tenuous an interest although concededly having 'some measure of control' through their 'temporary presence.'" *Id.* at 265. Other possessors who have "'dominion of the apartment' or who are 'domiciled' there" have the capacity to assert Fourth Amendment protection. *Id.* at 265.

The Court found that the defendant's interest in his friend's apartment as a guest was legitimate enough for him to claim Fourth Amendment protection even though he did not have ownership in or a right to possess the premises. *Jones*, 362 U.S. at 365-66. The Court reasoned that the defendant was present in the apartment with the permission of the person who legally possessed the apartment and the defendant was given a key so he could access the apartment. *Id.* at 259-65. Thirty years later in *Minnesota v. Olson*, the Court reaffirmed the principle that a

guest or invitee may have the capacity to claim Fourth Amendment protection. *Olson*, 495 U.S. at 98.

In *Olson*, the Court found that the defendant, an overnight guest, had a personal legitimate expectation of privacy in his host's home because "a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures." *Olson*, 495 U.S. at 98.

An unauthorized driver may have an interest in a rental vehicle that is "recognized and permitted by society" for three reasons. First, an unauthorized driver's control over an authorized driver's rental vehicle is comparable to the level of control that an overnight guest has over a host's home. In *Olson*, the Court stated that "when the host is away or asleep, the guest will have a measure of control over the premises." *Olson*, 495 U.S. at 99. Similarly, when an authorized driver gives express consent for an unauthorized driver to drive his or her rental vehicle, the unauthorized driver will have a measure of control over the vehicle. For example, the unauthorized driver can drive the vehicle to and from the driver's desired destinations.

Second, an unauthorized driver, like an overnight guest, has the ability to exclude others from an authorized driver's rental vehicle. *In Jones*, the defendant had the ability to exclude others, except the host, from the apartment. *Jones*,

362 U.S. at 265-67. Likewise, an unauthorized driver who has the consent of the authorized driver can exclude others, except the authorized driver or rental company, from the rental vehicle.

Third, an authorized driver may share his or her privacy in a rental vehicle with an unauthorized driver like a host who shares his or her privacy with an overnight guest. In *Olson*, the Court stated "[t]he houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest." *Olson*, 495 U.S. at 99. In the same way, an authorized driver who gives express consent for an unauthorized driver to drive the rental vehicle is also willing to share his or her privacy in the vehicle. For example, just as an overnight guest may be able to keep personal belongings in the host's home thus sharing the host's expectation of privacy in the home, an unauthorized driver can carry personal belongings in the vehicle with the shared expectation of privacy of the authorized driver.

Thus, the Court has found that individuals do have a personal reasonable expectation of privacy in situations like the case at bar. The Third, Fourth, Fifth, and Tenth Circuit's reasoning that an unauthorized driver does not have a reasonable expectation of privacy merely because the driver has no legal property right asks this Court to depart from fifty years of the Court's jurisprudence. Such departure is neither necessary nor warranted.

B. Automobiles Are Vital To Society.

Automobiles play an important role in society, and operators of such automobiles should have a recognized personal reasonable expectation of privacy within such vehicles. The Court has noted that a consideration in determining whether a person has a reasonable expectation of privacy is whether the activity in question serves functions recognized as valuable by society. *See Carter*, 525 U.S. at 89; *Olson*, 495 U.S. at 98-99. For example, the Court reasoned in *Olson* that overnight guests have a reasonable expectation of privacy in the host's home because such overnight visits are viewed as socially valuable. *Olson*, 495 U.S. at 98-99. The Court stated:

> Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognized that a houseguest has a legitimate expectation of privacy in a host's home.

Olson, 495 U.S. at 98.

The Fifth Circuit reiterated the social function analysis from *Olson* in *United States v. Smith*. 978 F.2d 171 (5th Cir. 1992). In *Smith*, the court noted that the reasonable expectation of privacy inquiry should consider what role the activity in question plays in society. *Id.* at 177. In *Smith*, the defendant sought to suppress evidence obtained from the interception of his wireless telephone conversations. *Id.* at 180. The court recognized the "vital role" the telephone plays in society and the expansion of wireless technology. *Id.* at 177 (quoting *Katz*, 389 U.S. at 352). The Fifth Circuit emphasized the importance of analyzing the social utility and society's reliance on the subject activity before stripping a person of his or her Fourth Amendment rights. *Id.* Thus, in determining whether a person's expectation of privacy is one that society recognizes as reasonable, the Court must consider whether the activity serves functions recognized as valuable by society. *Olson*, 495 U.S. at 98-99.

Automobiles in general are essential to society. According to the Bureau of Transportation, the automobile remains the most common means of transportation to work.[3] More specifically, in 2015 126,924 people, making up just

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[3] *Table 1-41: Principal Means of Transportation to Work (Thousands)*, BEAU OF TRANSPORTATION STATISTICS, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_41.html (last visited Oct. 28, 2017).

above eighty-five percent of the individuals surveyed, reported using automobiles to commute to work.[4]

Rental cars are both commonly used and vital to society. In 2016, there were 2,313,027 rental cars reported in service, which is over a hundred and thirty thousand more than in 2015.[5] A 2005 poll indicated that one-third of drivers twenty-five years of age or older often need an additional vehicle than their primary car and are "more likely to rent a vehicle."[6] For example, a person might need a larger vehicle to move furniture and belongings or to simply carpool with family and friends to a desired destination. Also, a person might need a rental car if his or her personal vehicle is being repaired.

Like staying overnight at a host's home, the use of a rental car is an activity that serves functions recognized as valuable by society and the fact that a driver is unauthorized should not change this reasoning. Courts recognize that the

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[4] *Id.*

[5] ***2016 U.S. Car Rental Market***, AUTO RENTAL NEWS, http://www.autorentalnews.com/fileviewer/2451.aspx (last visited Oct. 28, 2017); ***2015 U.S. Car Rental Market***, AUTO RENTAL NEWS, http://www.autorentalnews.com/fileviewer/2229.aspx (last visited Oct. 28, 2017).

[6] ***Rental Car Industry Expansion into Neighborhoods to Meet Lifestyle and Transportation Needs***, THE AUTO CHANNEL, (May 1 2005), http://www.theautochannel.com/news/2005/05/18/090459.html.

use of rental cars by unauthorized drivers is a common practice in today's society. *See Roth v. Old Republic Ins.*, 269 So. 2d 3, 6-7 (Fla. 1972); *Thrifty Car Rental, Inc. v. Crowley*, 677 N.Y.S.2d 457, 459 (Sup. Ct. Albany Co. 1998); *Motor Vehicle Acc. Indemn. Corp. v. Cont'l Nat. Am. Group Co.*, 35 N.Y.2d 260, 264-65 (1974). The Supreme Court of Florida noted that unauthorized drivers operating rental cars is "[i]n the very nature of modern automobile use." *Roth*, 269 So. 2d at 6-7. Such practice is both "foreseeable", *Id.*, and its widespread presence is "exceedingly great." *Motor*, 35 N.Y.2d at 264-65. *See also Thrifty*, 677 N.Y.S.2d at 459 (noting that unauthorized drivers' use of rental cars is a "common scenario").

Rental cars are driven by unauthorized drivers for various reasons. For example, an authorized driver may become sick or injured and be unable to drive the vehicle, so an unauthorized driver may have to drive the rental car. Often the additional drivers must be present to sign the rental agreement, must present an acceptable credit or debit card in their own name, and pay an additional daily fee.[7] Jumping through such hoops may not be practical or even possible at the time. Finally, while some rental companies allow an authorized driver's spouse to operate the vehicle,[8]

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[7] *See Rental Qualifications and Requirements*, HERTZ, https://www.hertz.com/rentacar/reservation/reviewmodifycancel/templates/rentalTerms.jsp?KEYWORD=OPERATORS&EOAG=EWKC31 (last visited Oct. 22, 2017).

[8] *See Id.*

some unmarried authorized drivers may allow their unauthorized significant others to operate the vehicle. These examples are only a few of the various circumstances where an unauthorized driver would operate a rental vehicle. The fact that the driver is unauthorized should not negate the driver's personal reasonable expectation of privacy.

C. Drivers Must Not Be Precluded From Claiming Fourth Amendment Protection Merely Because The Place Searched Was An Automobile.

While it is undisputed that the home is entitled to "special protection as the center of the private lives of our people," *Carter*, 525 U.S. at 99, the court has repeatedly held that a person may have a reasonable expectation of privacy in places other than the person's own home. *See Olson*, 495 U.S. 91 (holding that an overnight guest has a reasonable expectation of privacy in the host's home); *see also United States v. Jones*, 565 U.S. 400 (2012); *O'Connor v. Ortega*, 480 U.S. 709 (1987).

In *O'Connor*, the Court found that a public employee had a reasonable expectation of privacy in his office. *O'Connor*, 480 U.S. at 718. The Court focused on whether the public employee's expectation of privacy in his desk and file cabinets was one that society would consider reasonable. *Id.* at 715-18. The Court reasoned, in part, that even though an office is seldom private and free from entry by others, an employee may keep personal items in the office. *Id.* at 716-18. Thus, the

defendant's expectation of privacy was one that society would recognize as reasonable. *Id.* at 18.

In the automobile context, the driver does not lose all reasonable expectation of privacy merely because the automobile is subject to government regulation. *Prouse*, 440 U.S. at 662. As the Court noted in *Terry v. Ohio*, people are not stripped of Fourth Amendment protection when they walk out of their homes onto public sidewalks. 392 U.S. 1 (1968). "Nor are they shorn of those interests when they step from the sidewalks into their automobiles." *Prouse*, 440 U.S. at 663.

Recently, the Court reaffirmed a person's reasonable expectation of privacy in the automobile context in *Jones*, 565 U.S. 400. The Court found that a person has a reasonable expectation of privacy on the underbody of a vehicle. *Id.*

In *Prouse*, the Court emphasized that a person does not shed his or her constitutional right to privacy when he or she steps into an automobile. *Prouse*, 440 U.S. at 662-63. In affirming this principle, the Court reasoned that automobile travel is a common and often necessary mode of transportation to and from work, home, and other activities. *Id.* at 662. Moreover, people often spend more hours each day traveling in automobiles than walking on the streets. *Id.* at 662. Indisputably, many people experience a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by other modes of transportation. *Id.* at 662. "Were the individual

subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed." *Id.* at 662-63. Thus, this Court must not strip a driver of his or her Fourth Amendment protection merely because the invaded place was an automobile.

II. PEOPLE'S CONSTITUTIONAL RIGHTS MUST NOT HINGE ON CONTRACTUAL AGREEMENTS.

Rather than staying true to the Court's precedent focusing on what "society is prepared to recognize as 'reasonable,'" the Third Circuit's approach relegates Fourth Amendment jurisprudence to a subcategory of contract law. This is contrary to what the founders intended in adopting the Fourth Amendment. *See* U.S. Const., amend. IV. Undoubtedly, the text of the Fourth Amendment lacks any assertion that people's privacy rights are subject to contractual agreements. *Id.* Essentially, the Third Circuit's approach places contract law above the core constitutional rights established in the Fourth Amendment. The Third Circuit seeks to strip the basic rights under the Fourth Amendment from not only the petitioner, but countless future drivers only because the driver is not listed on the rental agreement. The Supreme Court should not permit such a result.

This Court must not adopt a bright line rule leaving unauthorized drivers vulnerable to

invasive and unlawful searches and seizures with no ability to claim Fourth Amendment protection merely because there may be a breach of the rental agreement for four reasons. First, such a bright line rule would conflict with the Court's Fourth Amendment jurisprudence. Second, courts have recognized that a breach of contract does not affect the rights of a third party. Third, adopting such a bright line rule would create rather than remove an incentive for police officers to disregard the Constitution. Finally, such a bright line rule is illogical.

A. A Bright Line Rule That Prevents Unauthorized Drivers From Challenging Fourth Amendment Violations Because Of Contractual Agreements Conflicts With This Court's Jurisprudence.

People's constitutional right to privacy must not rest on contractual agreements. Such a holding would conflict with the Court's Fourth Amendment precedent. In *Jones*, decided by the Court in 1960, Justice Frankfurter, writing for the majority, noted that a person who is "wrongfully on the premises" would not have the ability to assert Fourth Amendment protection. 362 U.S. at 267. Likewise, in *Rakas*, Justice Rehnquist affirmed this statement stating that "one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them." 439 U.S. at 141. Thus, the question is whether an unauthorized driver is "wrongfully on the premises."

In *Rakas*, Justice Rehnquist disagreed with some lower courts that had held that a defendant in a stolen car had a reasonable expectation of privacy. *Rakas*, 439 U.S. at 141 n.9. Thus, the Court indicated that the term "wrongfully on the premises" may mean "illegal" or "unlawful." *Id.* at 141. The Court explained that an example of "wrongful" may be *criminal* violations such as a stolen car, not necessarily violations of *private* law. *See Rakas*, 439 U.S. at 141 n.9 (emphasis added). Moreover, the Court further elaborated that a burglar who is storing stolen goods in a cabin may have a justified subjective expectation of privacy, but not one that the law would recognize as "legitimate" because the burglar's presence is "wrongful." *Rakas*, 439 U.S. at 143 n.12. The Sixth and Ninth circuits have discussed whether an unauthorized driver is illegally or unlawfully in the rental vehicle for purposes of Fourth Amendment protection.

In *United States v. Smith*, the Sixth Circuit noted that it was not illegal for the defendant, an unauthorized driver, to possess or control the rental vehicle even though he was not named as an authorized driver on the rental agreement. 263 F.3d 571, 587 (6th Cir. 2001). The court stated:

> Although Smith's use of the vehicle was clearly a breach of the agreement with Alamo, it does not follow that he has no standing to challenge the search. It was not *illegal* for Smith to possess or drive

> the vehicle, it was simply a breach of the contract with rental company.

Id. at 587 (italics in original).

Likewise, in *United States v. Thomas*, the Ninth Circuit noted that an unauthorized driver, who has consent to drive the rental vehicle from an authorized driver, has a legal right to exclude others from the vehicle, even if his or her use of the vehicle breaches the terms of the rental agreement between the authorized driver and the rental company. 447 F.3d 1191, 1198-99 (9th Cir 2006).

Constitutional protections cannot and should not hinge on contractual provisions. The Court has implicitly defined "wrongfully on the premises" as illegally or unlawfully. *Rakas*, 439 U.S. at 141. As the Sixth and Ninth Circuits have emphasized, a driver is not illegally or unlawfully possessing the vehicle simply because the driver is not listed as an authorized driver on the rental agreement. Courts that have held that an unauthorized driver does not have a reasonable expectation of privacy in a rental vehicle focused on the violation of the terms of the rental agreement and property rights. *See Kennedy*, 638 F.3d at 159; *United States v. Riazco*, 91 F.3d 752 (5th Cir. 1996); *United States v. Obregon*, 748 F.2d 1371 (10th Cir. 1984). However, those courts fail to address this seemingly clear conflict that conduct that may give rise to civil liability, possibly due to a breach of contract, does not equal criminal liability.

Although the unauthorized driver's use of the vehicle may be a breach of the rental agreement giving rise to potential civil liability for the renter or authorized driver, the Court must not equate civil liability with criminal liability. Applying the Court's jurisprudence and the Sixth and Ninth Circuit's rationale, an unauthorized driver's use of the vehicle should not pass the threshold of "illegal or unlawful." To hold otherwise would conflate standards of liability that are polar opposites. Thus, the Court should not allow people's Fourth Amendment rights to depend on contractual terms or breaches thereof.

B. Courts Have Recognized That A Breach Of Contract Does Not Affect The Rights Of A Third Party.

Courts have recognized that a third party's rights are not necessarily affected when there is a breach of contract between the original parties. *See generally Kleyle v. Deogracias*, 195 So.3d 234 (Miss. Ct. App. 2016); *Young v. District of Columbia*, 752 A.2d 138 (D.C. 2000). Especially, the context of subleasing and assignment expands on this principle. The *Code of Federal Regulations* defines a sublease as "a transfer of a non-record title interest in a lease, i.e., a transfer of operating rights." 43 C.F.R. 3100.0-5(e) (2014). An assignment is defined as a "transfer of all or a portion of the lessee's record title interest in a lease." *Id.* At common law, the general rule is that, in the absence of an express restriction, a tenant for a definite term has an unrestricted right to

assign or sublet at will. *Kruger v. Page Management Co., Inc.*, 432 N.Y.S.2d 295, 299 (App. Div. 1980). Furthermore, "provisions or covenants in a lease restricting assignment or subletting are 'restraints which courts do not favor.'" *Id.* at 300 (citing *Riggs v. Pursell*, 66 NY 193, 201 (1876); *Presby v. Benjamin*, 169 NY 377, 380 (1902)). The reason is such are restraints on free alienation. *Id.* at 300.

Even if the agreement between the landlord and the tenant prohibits assigning or subleasing, the tenant can still choose to do so. However, the landlord may be able to sue the original tenant for breach and recover damages. *Weisman v. Clark*, 232 Cal.App.2d 764, 768 (1965); *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc.*, 58 Haw. 606, 615 (1978); *Theatre Row Phase II Assocs. v. Nat'l Recording Studios, Inc.*, 739 N.Y.S.2d 671 (2002). Some courts have found in such scenarios that the restriction on subleasing or assigning with or without the landlord's consent does not automatically void the sublease or assignment. *See Webster v. Nichols*, 104 Ill. 160, 171 (1882) (stating that a clause in the lease prohibiting assignment without the written consent of the lessors does not render the assignment absolutely void but merely voidable at the option of the lessors or their representatives); *Eldredge v. Bell*, 64 Iowa 125, 130 (1884) (stating that a violation of a prohibition on assignment does not cause forfeiture in the absence of any declaration of forfeiture); *Weisman*, 232 Cal.App.2d at 768 (noting that an assignment in violation of a prohibition on assigning remains

valid until the landlord elects to take action based on the breach); *see also Young*, 752 A.2d 138 (noting that "[r]estrictions in original lease against subletting do not affect, as between lessee and sublessee, the validity of the sublease"); *Kleyle*, 195 So.3d 234 (breach of landlord consent provision in the lease did not excuse subtenant from paying rent due under sublease).

According to the Sixth and Ninth Circuits, when there is a breach of the prohibition on subleasing or assigning in a lease between the landlord and the original tenant, the third-party subtenant may still have a reasonable expectation of privacy in the place subleased or assigned. *United States v. McClendon*, 86 Fed. Appx. 92, 93-96 (6th Cir. 2004); *Khlee v. United States*, 53 F.2d 58 (9th Cir. 1931). In *McClendon*, the tenant of an apartment was the only person authorized to live at the residence. However, the tenant sublet the bedroom of the apartment to the defendant. Even though the defendant was not authorized to live in the bedroom by the landlord, the Sixth Circuit found that the defendant had a reasonable expectation of privacy in the bedroom. The court expressly rejected the government's argument that the defendant had no expectation of privacy in the bedroom because the terms of the tenant's lease prohibited subletting. The court stated that the tenant's "violation of her lease in subletting the bedroom to McClendon did not deprive McClendon of a reasonable expectation of privacy in what was admittedly his residence." *McClendon*, 86 Fed. Appx. at 95. The court also reasoned that while the

sublease may have violated the rental agreement with the housing authority, the government cited no authority indicating that that breach of contract takes away the defendant's expectation of privacy. Hence, the defendant's motion to suppress was properly granted by the trial court.

In *Khlee*, the Ninth Circuit found that the defendants had a reasonable expectation of privacy in the place the defendants sublet even though the sublease was a breach of the prohibition on subleasing or assigning without consent. The court reasoned that there was no showing that the owner or the original tenant had made any demand upon the defendants to vacate the premises. Thus, the defendants were under a "color of right" and their presence in the property did not amount to trespass. *Khlee*, 53 F.2d at 61.

The Court has never allowed contract law to take precedent over people's constitutional rights. Now is not the time, nor will there ever be a time, to allow the Constitution to be so diminished. While the cases addressed above relate to real property as opposed to automobiles, the concept that a breach of a rental agreement should not affect the rights of a third party is applicable to the case at bar. This Court should not allow a breach of contract between an authorized driver and the rental company to affect the constitutional rights of the third party unauthorized driver.

C. A Rule That Strips A Driver Of His Or Her Constitutional Right To Privacy Merely Because The Driver Is Not Named On The Rental Agreement Would Contradict This Court's Own Fourth Amendment Doctrine.

The Court is charged with the duty to uphold the purpose of the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). Such purpose is evident from the text itself: "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const., amend. IV. Over a century ago, the Court established a remedy for Fourth Amendment violations. *Weeks v. United States*, 232 U.S. 383 (1914). The Court unanimously agreed that allowing evidence, obtained unlawfully, to be admitted would "affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution." *Weeks*, 232 U.S. at 394. Thus, the exclusionary rule was created to "effectuate the guarantees of the Fourth Amendment." *United States v. Calandra*, 414 U.S. 338, 347 (1974).

Nearly fifty years later, Justice Clark, writing for the majority in *Mapp v. Ohio*, emphasized that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

A rule that completely strips a driver of his or her Fourth Amendment protections based on the terms of a rental agreement would *create* an incentive for police to disregard the Constitution. Such a rule "seriously undervalues the privacy interests at stake" and triggers the concerns expressed by the Court in *Arizona v. Gant*. 556 U.S. 332, 345 (2009). In *Gant*, the Court addressed whether a vehicle must be within the arrestee's reach to validate a search incident to the arrest. *Id.* at 342. The Court rejected a broad reading of *New York v. Belton*, 453 U.S. 454 (1981), which would create a bright line rule allowing searches incident to arrests even if the arrestee is not within reaching distance of the vehicle, for several reasons. *Id.* at 343. The Court explained:

> A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing the evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345.

The Supreme Court must not adopt a rule that contradicts the Court's own policy of removing rather than creating incentives to disregard the Constitution. Just as the Court expressly rejected a rule giving police the ability to search a vehicle whenever the driver is caught committing a traffic offense, this Court must reject a bright line rule that gives police officers the ability to search a rental vehicle whenever officers discover a breach of the rental agreement. Such a bright line rule that prevents an unauthorized driver from challenging Fourth Amendment violations gives police officers an automatic loophole to the exclusionary rule because the unauthorized driver would be unable to claim Fourth Amendment protection. Essentially, such a rule would give police "limitless discretion to conduct exploratory searches" whenever officers identify a breach of a rental agreement. *Gant*, 556 U.S. at 345 n.5. In such situations, the police officer needs no basis for believing that evidence of an offense might be found in the car because the rule would allow the officer to "rummage at will" in hopes of finding evidence. *Id.* The Court must not adopt a bright line rule that threatens to subject unauthorized drivers to arbitrary invasions of privacy.

D. The Third Circuit's Approach Would Lead To Absurd Results.

The Court has always consciously sought to avoid unworkable rules. *See Gant*, 556 U.S. 332; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). In fact, the Court may overrule its own precedent if the precedent proves to be unworkable. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The Third Circuit asks this Court to adopt a rule that would yield illogical results because the rule conflicts with expectations that society would consider reasonable. The rule also fails to distinguish between unauthorized drivers and authorized drivers that breach the rental agreement. The Court must not adopt a rule that would result in absurd dispositions.

1. The Third Circuit's Approach Conflicts With What "Society Is Prepared To Accept As Reasonable."

The Court must look beyond the four corners of the rental contract when determining what "society is prepared to accept as reasonable." An unauthorized driver does have a personal reasonable expectation of privacy in a rental vehicle because such expectation falls squarely within what society would recognize as reasonable. Automobiles are valuable to society. Rental cars in general, even if driven by unauthorized drivers, are both valuable and common. Although an unauthorized driver's use of a rental vehicle may

be without the rental company's permission, the inquiry is not whether allowing such conduct would go against the wishes of the rental company, the inquiry is whether the unauthorized driver's expectation of privacy falls within what society would recognize as reasonable. The answer is clearly yes.

The terms of an adhesion contract must not be a proxy for what "society is prepared to accept as reasonable" because such contracts conflict with what society would permit. A rental agreement is a strict adhesion contract because it is a standardized contract, drafted by the rental company, that is offered on a take-it-or-leave-it basis. *See Strand v. U.S. Bank Nat. Ass'n ND*, 693 N.W. 2d 918, 924 (N.D. 2005). Take-it-or-leave-it contracts may prohibit conduct that society accepts as reasonable and are inconsistent with societal expectations of reasonableness. For example, rather than being consistent with expectations that society would recognize as reasonable, contractual requirements that every driver be an "authorized" driver may be the company's attempt to limit insurance exposure and to accrue additional profit.[9] Because an adhesion contract conflicts with expectations that society would recognize as reasonable, it cannot be the basis for determining who has a reasonable expectation of privacy.

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[9] *See Consumer Information*, FEDERAL TRADE COMMISSION, (Sept. 2012), https://www.consumer.ftc.gov/articles/0208-renting-car (warning consumers to look out for "[a]dditional-[d]river fees").

2. If A Driver Of A Rental Vehicle Has No Reasonable Expectation Of Privacy Merely Because The Driver Is Unauthorized, Then Many Originally Authorized Drivers Lack A Reasonable Expectation Of Privacy.

If the Court focuses on the rental contract in determining whether a driver has a reasonable expectation of privacy, even drivers that are authorized by the contract itself may not have the ability to claim Fourth Amendment protection. The result of focusing on the rental contract would be to eliminate an authorized driver's reasonable expectation of privacy in the rental vehicle when the driver breaches the terms of the agreement.[10]

Take-it-or-leave-it contracts, such as the ones used by rental companies, are easily breached by authorized drivers. For example, allowing another person to drive the car, driving on unpaved roads, fueling the car with the wrong gas, and having too many people in the vehicle can automatically cause the authorized driver to be in breach of the agreement.[11]

Permitting an authorized driver, who becomes unauthorized by breaching the rental

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[10] *See Fastbreak Service Terms and Conditions United States & Canada*, BUDGET, (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.

[11] *Id.*; *see also Standard Terms and Conditions of Rental*, HERTZ, https://images.hertz.com/pdfs/RT_FULL_HR_EN.pdf (last visited Oct. 21, 2017).

agreement, to assert Fourth Amendment protection while preventing an unauthorized driver from doing the same, creates a conflict. Courts have explicitly indicated that an authorized driver has a reasonable expectation of privacy in a rental car. *See United States v. Walton*, 763 F.3d 655 (7th Cir. 2014); *Kennedy*, 638 F.3d 159 (emphasizing an authorized driver's property interest); *United States v. Walker*, 237 F.3d 845 (7th Cir. 2001). Moreover, even when the driver breaches the agreement with the rental company, he or she has a reasonable expectation of privacy. *United States v. Walton*, 763 F.3d 655 (7th Cir. 2014). In *United States v. Cooper*, the Eleventh Circuit held that the authorized driver did not lose his expectation of privacy in the rental vehicle even though the vehicle was four days overdue. 133 F.3d 1394 (11th Cir. 1998). The court stated that the driver's "failure to call Budget to extend the due date four days may have subjected him to civil liability, but it should not foreclose his ability to raise a Fourth Amendment challenge to the officers' search of the rental car in a criminal proceeding." *Id.* at 1402. Likewise, in *United States v. Henderson*, the Ninth Circuit held that an authorized driver has a reasonable expectation of privacy in a rental car even after the lease expires and he or she breaches the rental agreement. 241 F.3d 638 (9th Cir. 2000).

The Third Circuit's approach asks this Court to distinguish between two types of drivers: (1) an authorized driver who breaches the rental agreement and becomes an unauthorized driver

and (2) an unauthorized driver who has permission from the authorized driver to use the rental car. The problem is that the Third Circuit's approach asks this Court to arbitrarily allow the former to assert Fourth Amendment protection while the latter is left without the ability to challenge unlawful police misconduct. Because an authorized driver can so easily breach the agreement and lose his or her right to operate the vehicle, thereby becoming an unauthorized driver, this result is absurd. Arbitrarily distinguishing between the two drivers is simply confusing and illogical. The only difference between the two drivers is that the former is listed on the rental agreement. The ending of both scenarios is the same, both drivers are unauthorized yet only one has a reasonable expectation of privacy. The Supreme Court should not allow other courts to utilize this confusing and unworkable approach, especially when people's constitutional rights are at stake.

CONCLUSION

This Court should reverse the Third Circuit's ruling that an unauthorized driver does not have a reasonable expectation of privacy in a rental vehicle. While the unauthorized driver may not retain a legal property or contractual right in the rental vehicle, the unauthorized driver should retain his or her ability to assert constitutional protection.

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